IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1577

JOSEPH A. BRODERICK,

Petitioner,

v.

CATHOLIC UNIVERSITY OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The Petitioner Joseph A. Broderick prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled action on January 29, 1976.*

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the District of Columbia of January 29, 1976 is not yet reported and is attached as Appendix A. The judgment of that Court is attached as Appendix A-1.

The memorandum opinion of the United States District Court for the District of Columbia dated October 17, 1973 (which is reported at 365 F.Supp. 147) is attached as Appendix B. The District Court judgment, entered on October 23, 1973, is attached as Appendix B-1.

* An action against respondent Catholic University of America brought by David J. K. Granfield was joined with that of Petitioner for purposes of trial and appeal. We have been informed that Professor Granfield is also filing a petition for certiorari.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the District of Columbia were entered on January 29, 1976. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. May a sectarian institution of higher education receive federal funds as an *educational* institution under *Tilton* v. *Richardson,** discriminate on religious grounds in using those funds for faculty salaries, and then claim itself free as a *religious* institution from First Amendment Establishment and Free Exercise restraints, to defeat a breach of contract suit by a law faculty member?

2. Does a suit by a faculty member against a sectarian higher educational institution have the concrete adverseness required by Article III when the faculty member a) alleges that he has been injured by the institution's unconstitutional use of federal funds, and b) therefore asks the court to compel the institution to use whatever federal funds it receives, as to himself and as to others, in accordance with constitutional requirements; or does Article III require that such a plaintiff make a total attack — or no attack at all — on the constitutionality of *any* federal education funds being paid to such an institution?

3. Does a suit by a faculty member injured by a sectarian higher educational institution's unconstitutional use of federal funds by discriminatory disbursement of faculty salaries have the concrete adverseness required by Article III if the faculty member is a minister in the same religious sect to which the higher educational institution is related?

* 403 U.S. 672 (1971).

4. Assuming, in such a breach of contract suit by a faculty member against a sectarian institution of higher education which has received federal funds and then discriminated in disbursing them in faculty salaries fixed on the basis of religious rather than academic criteria, that there is sufficient "personal stake" and "concrete adverseness" to satisfy Article III requirements, do "prudential" grounds fashioned by the Supreme Court "for its own governance" forestall enforcement of Establishment and Free Exercise restraints on the use of such federal funds by the institution?

5. When a sectarian institution of higher education receives federal funds in the amount of 25% of its total annual income;* when the institution concededly discriminates on religious bases in the payment of faculty salaries; and when "the record [is] crystal clear that the moneys received by the University from the government are treated as unrestricted funds by the former, thereby demonstrating that some of the government funds find their way into faculty salaries . . .",** do First Amendment Establishment and Free Exercise restraints apply to the institution?

6. Does the action of a federal court, in determining that the employment contract between a sectarian institution of higher education and a professor is free of all First Amendment Religious Clause restraints, constitute "government action" under *Shelley* v. *Kraemer*,*** when the federal court acknowledges

a) that the institution has used federal funds to pay faculty salaries; and

b) that the institution has discriminated against the professor in determining his salary by application of religious rather than educational criteria?

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* Opinion of Court of Appeals, Appendix A, p. A17, fn. 21.

** Opinion of Court of Appeals, Appendix A, pp. A18-19.

*** 334 U.S. 1 (1948).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are Article III, Section 2, and the First and Fifth Amendments, United States Constitution.

> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . .; . . . — to Controversies . . . between citizens of different States . . ." U.S. Const., Article III, Section 2.
>
> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . ." U.S. Const., Amend. I.
>
> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ." U.S. Const., Amend. V.

STATEMENT OF THE CASE*

Respondent is a church-related institution of higher education (A2). Petitioner is a tenured professor at respondent's law school and is also a Catholic priest (A3). Respondent receives approximately 25% of its annual income from the United States Government (A17, fn. 21): these funds are treated by respondent as unrestricted funds, and are used in part to pay faculty salaries (A18-19).

Until 1968 respondent as a matter of policy had one scale of salaries for its lay faculty members, and another and lower salary scale for those faculty members who were clergy or religious (A2). In December, 1968, the administration of respondent announced that its Board of Trustees had approved a policy of "parity of clerical and lay salaries", to be "achieved as soon as possible" (A6-7).

After adoption by respondent of the principle of parity, petitioner negotiated with respondent for immediate parity

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* References herein to the Court of Appeals opinion are to page numbers in Appendix A.

with respect to his own salary.* In reliance on notification that his salary for the following year would be "with no clerical discount" petitioner returned to the law school and resumed his teaching duties (A12-14).

In December, 1970, respondent's Board of Trustees abruptly repudiated parity as an official University policy (A7), and petitioner did not receive a parity salary thereafter (A15, fn. 18).

Petitioner thereupon commenced this action in the United States District Court for the District of Columbia, seeking declaration and vindication of petitioner's contract rights. Petitioner's contractual allegations had two aspects: a negotiated agreement aspect (which is not the basis of this petition), and a tenure contract interpreted in light of constitutional mandates.

The negotiated contract allegations were that respondent agreed in 1970 to pay petitioner thereafter a salary predicated solely on academic considerations "without clerical discount", and not on criteria based on religion (that petitioner was a priest as well as a law professor) (A12-14).

While the Court of Appeals acknowledged that respondent had indeed agreed in 1970 to pay petitioner, a tenured professor, a salary "without clerical discount" and did so for one year, it declined to hold that the District Court had been clearly erroneous in ruling that the academic measure had been introduced for one year only (A14-15).

The second part of the complaint and the precise subject of this petition asks for declaration of petitioner's tenure contract rights in light of the constitutional requirements that furnish the context of the contract, and are binding on both parties.** Such constitutional issues would not have

* Petitioner was on sabbatical leave in 1969-70, and this negotiation was conducted by mail with the dean of respondent's law school (A12).

** The complaint also asks for specific performance of the contract properly construed in light of constitutional requirements, and an injunction against continuation by respondent of unconstitutional action in the premises.

been reached if the courts below had found express agreement by respondent permanently to discontinue using, as to petitioner, a religious rather than an academic standard for determining professional compensation.

The constitutional issues involve First Amendment violations of freedom of speech, Establishment and Free Exercise of religion, and Fifth Amendment due process (equal protection) as to petitioner. Petitioner contends that these issues bear directly upon declaration of his rights under his tenure contract against respondent, because respondent is a private, sectarian university which receives higher education funds from the United States government — funds constituting 25% of respondent's annual income (A17) — and uses them directly in payment of faculty salaries, including that paid with "clerical discount" to petitioner (A18-19).

The Court of Appeals noted that petitioner had thoroughly documented respondent's "receipt of funds from the Government, and other governmental relationships" (A17), and "that the moneys received by the University from the government are treated as unrestricted funds by the former, thereby demonstrating that some of the government funds find their way into faculty salaries (A18-19). The Court of Appeals in a curious turn held that respondent's use of federal funds to achieve religious objectives was beyond challenge in this action by petitioner. His contract rights, the Court of Appeals ruled, must be construed as if such "establishment" had not taken place. The court reasoned that the Establishment issue could only be raised by challenging totally the right of respondent to receive any federal funds whatsoever, a course petitioner had not taken, did not choose to take, and, he submits in this petition, was not required to take under any decisions of this Court (A17-20).

The Court of Appeals further ruled that petitioner could claim no restriction of his "free exercise of religion" because respondent's direct use of federal educational

funds to pay petitioner's salary fixed by religious test was the purely internal affair of a religious organization of which he was a member, as to which the courts were barred from intervening in the course of declaring petitioner's contract rights (A21-26).

The Court of Appeals ignored the fact that it was thus sanctioning the use by respondent for *religious* ends, on the grounds that it was a *religious* institution, of federal funds which it received on the representation that it was an *educational* institution.

Petitioner asks this Court for a writ of certiorari to the Court of Appeals to reverse these rulings with respect to the Establishment and Free Exercise clauses, and with respect to certain interlinear pronouncements of the Court of Appeals concerning Article III and standing requirements which depart from decisions of this Court. In light of any proper construction of the Establishment and Free Exercise clauses, and Article III, petitioner contends that his contract rights must be declared as entailing compensation based on no religious test so long as federal funds are used. Since petitioner's salary was frozen by respondent at the 1970-71 rate, and he was denied a merit increase proposed by the law school dean in 1971-72 and all cost of living increases since that date, petitioner has been accepting the 1970-71 salary rate, as frozen, under protest pending the declaration of his rights in this litigation. Mechanically computed, this underpayment, as above noted, totals approximately $26,122 as of the end of the 1975-76 academic year.

REASONS FOR GRANTING THE WRIT

This case presents important constitutional questions, incorrectly decided below, which have not been, but which it is submitted should be, resolved by this Court. They should be resolved for the guidance of federal courts; of the federal government and states in making federal funds available to church-related institutions; of the

church-related institutions which receive and disburse federal and state funds; and of faculty members and students at those institutions.

I. The need for a determination that a church-related institution which receives federal or state funds for educational purposes has no impermeable "Free Exercise" rights with respect to the disbursing of those funds. (Question 1).

Respondent has emphasized its status as an educational institution, according to the various criteria set forth in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), in seeking and receiving federal funds. When, in this case, its disbursement of those funds concededly to serve religious rather than educational purposes has been brought to the attention of the courts and challenged in the context of a contractual dispute between petitioner and respondent, respondent has emphasized its status as a sectarian and not an educational institution. It has persuaded the courts below that it is essentially a religious institution rather than an educational institution; that the salaries of its faculty members even when financed by federal funds (A18-19) are fixed to serve religious rather than educational ends; and that the courts are constitutionally powerless to do anything about it (A24-26).

This Court should articulate the proposition that, to the extent that federal and state funds are received by a church-related institution of higher education, they may constitutionally be disbursed only for educational purposes, and the institution concerned has no Free Exercise rights with respect to those funds, nor is there any Entanglement barrier to judicial restriction in a private action of the unconstitutional disbursement of those funds.

Surely the ideal constitutionally unobjectionable way of forestalling unconstitutional use of federal education funds is presented by this litigation, free from Entanglement obstacles. The parties to private litigation present

the evidence, and the court passes constitutional judgment on the evidence presented. But in this case the Court of Appeals, in effect, turned its back on this evidence, and declined to pass constitutional judgment. This approach — if it is accepted — effectively puts to rest any feasible oversight which private suit might furnish on the unconstitutional use of federal education funds.

When a church-related institution receives state or federal funds, those funds are necessarily received on a basis which requires that the institution use those funds constitutionally. Whether the sanction is based on an implied trust, on an estoppel to use the funds unconstitutionally, or simply on a requirement that they be disbursed in accordance with constitutional guidelines to be enunciated by this Court, it is clear that the funds cannot be used for sectarian purposes. A sectarian institution should not be able a) to receive federal or state funds on the representation that it meets the criteria of an institution of higher education as set forth in *Tilton* v. *Richardson, supra;* b) to proceed to disburse those funds to serve religious rather than educational purposes; and then c) to foreclose any inquiry, judicial or administrative, into its disbursement of those funds on the grounds that the inquiry would entail constitutionally prohibited Entanglement, or a violation of the institution's freedom to exercise religion. There may be an Entanglement bar to the government's ferreting out evidence of such misapplication, but surely when the evidence comes to light, as it has here through private litigation, there is no justification for allowing the misapplication to proceed unchecked.

What are the continuing obligations undertaken by a church-related institution which qualifies for the receipt of public education funds? There has been no express pronouncement by the Supreme Court on this problem, in all its various decisions in the church-state area.

However, this Court has recognized the special need for judicial check on the appropriation of government funds in

possible violation of First Amendment Religion Clause mandates, even at the behest of "non-Hohfeldian plaintiffs" (cf. *Flast* v. *Cohen,* 392 U.S. 83 (1968)). It is ironic that at a time when taxpayer and other public action plaintiffs are being closely scrutinized by the Court (*United States* v. *Richardson,* 418 U.S. 166 (1974), *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208 (1974); cf. *Warth* v. *Seldin,* 422 U.S. 490 (1975)), the Court of Appeals should question the policing value of a private action by a plaintiff with a clear "personal stake".

II. The need to determine the constitutionally appropriate method for supervising the distribution of federal or state funds received for educational purposes by church-related institutions. (Questions 2-4).

Petitioner did not and does not argue herein that funding by the federal government of respondent violates the Establishment Clause of the First Amendment. Respondent is in fact an educational institution of higher learning with sectarian sponsorship (cf. *Tilton* v. *Richardson, supra*). What respondent does argue, in the context of his tenure contract claim, is that the use by respondent of federal funds to pay faculty salaries in accordance with religious rather than educational criteria constitutes a violation of the Establishment Clause of the First Amendment. Cure for that vice is not to cut off the funding but to enjoin unconstitutional application of the funds received.

The Court of Appeals has suggested that the Office of Education should have been a party to this proceeding.* This is not so, and guidance from the Supreme Court is needed in this area.

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* After reading the Court of Appeals opinion, petitioner's counsel wrote to the Commissioner of Education notifying him of petitioner's intention to apply for a writ of certiorari herein, and inquiring as to the position of the Office of Education with respect to the issue herein. The letter of petitioner's counsel is attached to the petition as Appendix C: responses received from the Office of the General Counsel for Education

Petitioner brought this action to vindicate his contractual rights which he had as a member of the faculty of a law school of a church-related institution. His claim was that respondent institution had not only violated his contractual rights, but that the violation encompassed actions on the part of respondent which were constitutionally impermissible. These were matters for judicial and not for administrative determination.

The approach taken by petitioner is, in fact, certainly more desirable statutorily and constitutionally than the one implicitly suggested by the Court of Appeals.

With respect to the various statutes authorizing the grant or flow of federal funds to institutions of higher education, Congress in 20 U.S.C. 1232a proscribed interference by the federal government with the direction or administration of the institutions which receive assistance. This Court's admonitions against Entanglement are a First Amendment Religion Clause counterpart. Thus the exercise by the Office of Education of a policing function with respect to a church-related institution of higher education would encounter statutory strictures as well as the Entanglement arguments raised by respondent herein.

The approach urged by petitioner actually provides an effective and unobjectionable way to police the use of funds by a church-related educational institution. It respects the statutory pronouncement of the economic value of public support for higher education, and it draws to the attention of the court, in a particular "case" or

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of the Department of Health, Education and Welfare are attached as Appendices D and E.

HEW Counsel has suggested that, constitutional considerations aside, the Office of Education may "be precluded from interfering in a matter such as described in your letter because it primarily involves an issue concerning the internal administration of the educational institution." (Appendix E).

"controversy" involving a "Hohfeldian plaintiff",* constitutional departures when they occur so that the court may fashion suitable remedies thereto. It does not involve the Office of Education in auditing the internal administrative activities of the institution, which would run afoul statutory strictures; and it does not involve the Office of Education in an auditing of the religious activities of the institution, which would run afoul the constitutional prohibitions against Entanglement. In fact, so long as state and federal aid to church-related institutions is constitutionally permissible — as it is under *Tilton* v. *Richardson, supra* — the only type of policing which is possible, in light of the constitutional barrier of Entanglement, is court review of alleged specific violations in terms of specific statutory relationships which are contractual and educational, and not sectarian. This is the sort of relief which respondent has sought herein, and which was denied by the courts below.

Obviously, there were in this case, and there will be in every case, two ways to challenge on constitutional grounds the discrimination alleged: the claimant can seek a complete revocation of the flow of funds to the allegedly offending sectarian institution; or he can seek correction of the discrimination in the distribution of those funds in the context of the "case" or "controversy" of which he is a part.

If the remedy of correction is not available to specific claimants — if each claimant must seek to smash the structure of federal aid to his own sectarian institution of higher learning or take no action at all — in most cases no action will be taken. This is so because claimants who are faculty members or students in a sectarian institution of higher education have the interests of that institution at heart; they wish to see it prosper; they wish it to continue to receive public funds.

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* Cf. *Flast* v. *Cohen*, 392 U.S. 83, 119 (1968) (Harlan, J., dissenting opinion).

But they may also wish to see it disburse those public funds in a constitutional manner. If the availability of an implied trust or estoppel argument such as that made by petitioner herein is denied to petitioner and other claimants, as it was denied by the Court of Appeals, the courts will have renounced a manageable and justiciable means of supervising the use of public funds without the danger of Entanglement.

Entanglement is avoided very simply. The sectarian institution of higher education which elects to receive federal or state funds commits itself, by that election, to use those funds for educational purposes and no other, and very specifically not to use them for sectarian purposes. The acceptance of the funds constitutes a consent by that institution to judicial overview, upon challenge, of the constitutional appropriateness of the uses to which the federal funds are put.

We learn from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), that internal government enforcement activity within a sectarian institution connotes Entanglement. What should be permissible, and should indeed be entirely appropriate as a judicial approach to making *Tilton* v. *Richardson* viable for the long term — is the simple type of judicial control which petitioner seeks herein, which the courts can exercise in a manner which is consistent with *Tilton* v. *Richardson*, and which avoids Entanglement.

Every individual is a bearer of constitutional rights. The Court of Appeals, in refusing to take the trust or estoppel approach with respect to petitioner's claim, has in substance conceded the constitutional violations which petitioner has alleged, has found petitioner not a reliable plaintiff (apparently because he is a minister of the same religious sect which sponsors the institution of higher education complained of), and has therefore refused to correct the constitutional violations which have been brought to its attention.

The veiled intimation that petitioner is subject in some way to respondent corporation in a religious capacity (A25), as distinct from his academic capacity, is without a scintilla of evidence in the record. To the same extent as any other faculty member, Catholic, Protestant, Jew, or secular humanist — all of whom are numbered among respondent's faculty members — petitioner has academic responsibilities to respondent. The very fact of bringing this litigation and persisting in it would seem to be hard evidence of petitioner's independence of respondent in any trans-academic sense, unless the Court view the action as in some sense spurious.

The Court of Appeals seems to have said that one cannot challenge the disbursement of federal funds by a church-related institution of higher learning for religious purposes or pursuant to religious criteria as constituting an Establishment of Religion, except by calling for a complete surcease to the flow of federal funds to that institution. Petitioner has sought a declaratory judgment that salaries may not be paid by respondent on a religiously discriminatory basis; he has sought to enjoin the payment of salaries on such basis; and he has sought judicial determination that his rights under his tenure contract should be declared accordingly. But petitioner has not sought to have respondent declared ineligible for future receipt of federal funds, and the Court of Appeals has therefore characterized petitioner as an "apostate" to his Establishment argument, and has affirmed the denial of relief to him (A17-21).

Thus the Court of Appeals has in substance said: Respondent may well have unconstitutionally disbursed funds received from the federal government for sectarian religious purposes. If it has, it may continue to do so, since the relief sought by petitioner is not drastic enough. The Court of Appeals would require petitioner to shed his Hohfeldian "personal stake" and assume a non-Hohfeldian stance — since he has not done so, the Court of Appeals has

denied him relief on his real and adverse claim against respondent.

In this case the Court of Appeals apparently has not denied that petitioner has standing, but it has insisted that, because he is a member of the sect to which respondent is related, or because the constitutional complaint he has made and the relief he has sought do not have the broad reach which the Court of Appeals believes they should have, relief should be denied. Thus admitted standing can, under the Court of Appeals opinion, be eliminated at will in the exercise of judicial discretion. This is not, it is submitted, an acceptable emendation of this Court's pronouncements on standing.

The Court of Appeals decided with obvious difficulty (A12-15) that the district court's ruling against petitioner as to the negotiated agreement was not clearly erroneous. It then treated the contract-constitutional claim as if it constituted an independent matter in which petitioner had no "personal stake" sufficient to ground Article III standing, or at least as if it involved "constitutional rights of third parties" and not of petitioner himself.

Neither court below took seriously respondent's suggestion that the courts were not open to a plaintiff-professor to adjudicate a breach of contract claim against defendant university on the ground that this was an internal religious dispute. And with good reason. Why then did the Court of Appeals, in adjudicating petitioner's rights under his tenure contract, decline to enforce Establishment and Free Exercise limitations?

The Court of Appeals' position is either (1) that by introducing Establishment and Free Exercise considerations plaintiff is no longer arguing his own rights, but those of third parties, and so is bound by the constitutional rule enunciated in *Barrows* v. *Jackson,* 346 U.S. 249 (1953), and *Moose Lodge* v. *Irvis,* 407 U.S. 163 (1972); or (2) that to the extent that petitioner Broderick purports to assert his own rights in making his Establishment-

Free Exercise contentions he is not a reliable plaintiff, since in addition to being a tenured professor in the law school of a higher educational institution he is an accredited minister in the same religion to which the respondent University is related.

Each of these propositions is of a generalized nature far transcending the outcome of this litigation. They constitute the considered judgment of an influential panel of an influential Court of Appeals. The first of these propositions, if accepted, would considerably narrow the presently narrow possibility of effective enforcement of the Religion Clauses of the First Amendment in the crucial area where (as here) direct government financing of religion has been identified by a court. The second proposition may mean that a faculty member of a sectarian university receiving public funds is disqualified in this context as not furnishing as plaintiff the concrete adverseness required by Article III — or, perhaps, that he may be disqualified by "prudential considerations" even when Article III has been satisfied. Either way, there is introduced into a sensitive area of constitutional jurisprudence a puzzling view of standing and "case" and "controversy" (Cf. *Baker* v. *Carr,* 369 U.S. 186 (1962); *O'Shea* v. *Littleton,* 414 U.S. 488 (1974)), and a curious and dated stereotype of a Catholic monolith. This Court should either dispel or affirm these propositions, but at least consider them authoritatively. And now, lest they prevail by default.

III. The need for a determination of what constitutes "state action" or "government action" in the context of a church-related institution which receives state or federal educational funds, or whether this question is even a problem where state or federal education funds have concededly been overtly disbursed for religious rather than educational purposes. (Question 5).

In the normal situation the basic prescription for determining the presence or absence of the state or federal government in an otherwise private action is that of "sifting

facts and weighing circumstances", as set forth in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), and this Court has emphasized the need for establishing a "nexus between the state and the challenged action" (*Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974)).

In the case at bar, there is the clearest possible nexus between the action — payment by respondent of a salary which was determined by religious rather than educational criteria — and the receipt by respondent of federal funds.* The Court of Appeals so conceded, stating that petitioner made "the record crystal clear that the moneys received by the University from the government are treated as unrestricted funds by the former, thereby demonstrating that some of the government funds find their way into faculty salaries." (A18-19).

In fact, the direct use of federal funds in the precise discriminatory salary payment under attack establishes government involvement without need for the delicate "sifting" prescribed by *Burton* and the sensitive *Jackson* search for "nexus."

IV. The need for a determination whether a court's giving effect to the unconstitutional disbursement of federal higher education funds received by a church-related institution and distributed on the basis of religious criteria is in and of itself "government action." (Question 6).

Under the principles of *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), after it had been drawn to the attention of the courts below that respondent was receiving federal educational funds and disbursing them in accordance with

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* Approximately 25 percent of respondent's annual income comes from the United States Government, as grants for research, funds for student aid, interest grants on notes, and reimbursements for indirect costs (A17, fn. 21).

religious rather than educational criteria, the decisions of those courts to permit the continued distribution of those federal education funds for sectarian religious purposes in and of themselves constituted "government action," and the Establishment of Religion.

CONCLUSION

This case focuses, quite precisely, on the function of private litigation in connection with the disbursement by church-related institutions of public funds received pursuant to *Tilton* v. *Richardson* prescriptions. This Court has set forth in measured detail the bases upon which federal (and state) financial support constitutionally can flow to sectarian institutions of higher learning. For the continued viability of the *Tilton* v. *Richardson* prescriptions the Supreme Court should illumine, for the guidance of government administrators, sectarian institutions of higher learning and students and teachers thereof, and state and federal courts, the ways in which adherence to *Tilton* v. *Richardson* requirements can constitutionally be policed with respect to the disbursement of such funds. To what extent do constitutional Entanglement considerations prevent state and federal administrative overview? To what extend is the election by a sectarian institution of higher learning to accept federal and state funds a consent to judicial overview of the uses to which it puts those funds?

There is no guidance from the Supreme court in these areas today, as is witnessed by the two opinions below, and there is much confusion. This case presents these issues clearly, for which reasons we urge that the petition should be granted.

April 28, 1976

Respectfully submitted,

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APPENDIX A

APPENDIX A

Opinion of the United States Court of Appeals for the District of Columbia dated January 29, 1976

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA COURT

No. 74-1151

DAVID J. K. GRANFIELD, APPELLANT

v.

THE CATHOLIC UNIVERSITY OF AMERICA,
A DISTRICT OF COLUMBIA CORPORATION

No. 74-1152

JOSEPH A. BRODERICK, APPELLANT

v.

THE CATHOLIC UNIVERSITY OF AMERICA,
A DISTRICT OF COLUMBIA CORPORATION

Appeals from the United States District Court
for the District of Columbia

(Civil Actions 1534-71 & 1535-71)

Argued November 27, 1974

Decided January 29, 1976

Benjamin P. Lamberton, for appellant in No. 74-1151.

Samuel J. Murray, for appellant in No. 74-1152. *William R. Joyce, Jr.*, was on the brief for appellant in No. 74-1152.

Alfred L. Scanlan, with whom *James R. Bieke, Stephen A. Trimble* and *Nicholas D. Ward*, were on the brief for appellee.

Before: BAZELON, *Chief Judge*, LEVENTHAL, *Circuit Judge* and JUSTICE,* *United States District Judge* for the Eastern District of Texas.

Opinion for the Court filed by *District Judge* JUSTICE.

JUSTICE, *District Judge:*

INTRODUCTION:

The Catholic University of America is a private educational institution located in Washington, D.C.[1] Historically, the University has maintained a disparity between the salaries which it has paid its lay faculty members and those paid to clerical faculty members.[2] According to the appellee, this lower salary scale or "clerical

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* Sitting by designation pursuant to 28 U.S.C. § 292 (d)

[1] The relationship between Catholic University and the Catholic Church is discussed in the section of this memorandum which concerns the appellants' constitutional claims. *See* n. 19, *supra.*

[2] The clerical pay scale is approximately 65% of the comparable "lay scale". However, since the lay salary scale at the University's law school is significantly higher and there is an $11,000 salary limit for clerics, the percentage is lower in the law school. Appellant Granfield, for example, receives a salary which is approximately 50% of the median salary paid to other full professors at the Law School. The clerical scale was applied, without exception prior to 1970, to all priests on the faculty, whether or not they took vows of poverty or were subject to federal taxation.

discount" is a form of financial support for the University deliberately chosen by the Catholic Bishops.[3] It is the application of the clerical discount to their salaries which appellants attack in this civil action, both on constitutional and on contractual grounds. Prior to consideration of the appellant's first amendment contentions, we must assess the contractual claims of the priests in order to avoid, if possible, resolution of the controversy on constitutional grounds. *See, e.g., Ashwander v. Valley Authority,* 297 U.S. 288, 346-347, 56 S.Ct. 466, ———, 80 L.Ed. 688 (1936) (concurring opinion of Brandeis, J.).

Appellant David J. K. Granfield is a tenured professor of law at the University's Columbus School of Law, having been a member of the law school faculty since 1960. Granfield is a Roman Catholic priest and a member of the Benedictine Order. Appellant Joseph A. Broderick is also a tenured professor at the law school; he has been on the faculty since 1963, achieving tenure in 1969. Broderick is a priest in the Order of Preachers (Dominicans).

THE CONTRACTUAL ISSUES

Faculty Contracts

At Catholic University, the deans of the various schools are appointed by the President. The Dean of the Law School has authority to prepare a proposed budget for

[3] The clerical discount is said to prevent competition for financial reasons among the diocesan clergy for appointments to the University and to deter faculty from declining to return to religious and charitable work in their home dioceses if needed. The Bishops, in choosing to promulgate the clerical discount, are apparently in accord with a tradition whereby church-related colleges have expected some measure of sacrifice from members of their faculty. Such sacrifices, it is stated, help to permit the University to grant tuition discounts to clerical students, and to students preparing for the priesthood.

his school and to make recommendations concerning faculty salaries. The Executive Vice-President and Provost of the University must approve the proposed budget for the Law School; while this approval is not final, it provides a basis under which the Dean can make plans for the forthcoming academic year. Final authority over the budget resides in the Board of Trustees.

There are no formal written agreements between the University and the faculty members as to terms of employment. Official notification setting forth the terms of employment is by "letter of appointment."[4] Both appellants testified at the trial that they received letters of appointment at the beginning of each academic year in which there was some change in their rank or salary.

Sequence of Events Relevant to Claims of Both Appellants

As early as 1945, the University's Board of Trustees considered implementing a policy of salary parity between lay and clerical faculty. However, it was not until 1968 that efforts to achieve full parity appeared to come near realization. Against a background of "institutional declericalization",[5] the priest-professors at Catholic University had accelerated their agitation for salary equalization. The Board of Trustees was aware that, if parity was not to be adopted, a number of clerical faculty mem-

[4] The appointment letter is "the equivalent of an employment contract." *Board of Regents* v. *Roth,* 408 U.S. 564, 566, n. 1, 92 S.St. 2701, ———, 33 L.Ed.2d 548 (1972).

[5] During 1967-70 the University, which once functioned under the direction of the Roman Catholic Church, severed many of its ties with the Church. Only three schools now have "pontifical status"—these being the schools of Theology, Philosophy, and Canon Law. In 1969 a layman became president of the University. In addition, the student body and faculty, which were once nearly exclusively Catholic, gained significantly in non-Catholic percentage.

bers planned to leave the University to obtain full salaries elsewhere.[6] The faculty pressure culminated on February 8, 1968, when the Academic Senate[7] adopted a resolution requesting the Board of Trustees to institute a policy of parity and to "implement this policy without delay". Then, on September 12, 1968, the Finance Committee of the Board of Trustees reported that it "favored putting the salaries of clerical members of the faculty on a parity with lay members." At a meeting of the Board of Trustees on December 6-7, 1968, the Finance Committee, along with the Committee on Academic Affairs, resolved

> to go on record as still considering the desired goal in faculty salaries to be the A level of the AAUP [American Association of University Professors] scale—not Plan A—including, *eventually*, placing the salaries of clerical members of the faculty on a parity with lay teachers. (Italics added.)

The minutes of this meeting show a notation immediately following the above resolution:

> The Committees, however, faced the straitened 1969-1970 financial situation. Its realities make it impossible to implement Plan B as submitted by the Academic Senate.

[6] Bishop McDonald reported to the trustees that:

> There is a short supply of good teachers, and a highly competitive market with a rapidly growing student body. Secular as well as Catholic colleges and universities are willing to bid for qualified Catholic teachers, including priests. The situation has become critical and even desperate. (Minutes, Board of Trustees Meeting, April 28, 1965.)

[7] The Academic Senate is responsible for the academic governance of the University. The body is composed of members of the faculty, including the president of the University, deans and faculty representatives.

At this meeting, the formal recommendation of the Committees was to retain the salary scale then in effect, using available funds for new personnel and merit increments for the faculty. This recommendation was approved by the Board of Trustees.

On December 12, 1968, Acting President Nivard Scheel reported to the Academic Senate that the Board of Trustees, at the December 6-7 meeting, had

> approved a recommendation submitted jointly by its Committees on Academic Affairs and Finance that the AAUP "A" scale, and *parity of clerical and lay salaries be achieved as soon as possible.* However, because of limited revenues, "Plan B" cannot be achieved next year. Income from the rise in tuition will therefore be used to (a) maintain present salary scale, (b) permit recruitment of new administrative and faculty personnel, and (c) allow for merit increases to selected members of the faculty. (Italics added.)

This announcement by Acting President Scheel is at the heart of appellants' contention that the University promised adoption of a parity salary scale or made representations upon which they reasonably and detrimentally relied. On two subsequent occasions, Scheel addressed faculty meetings, expressing his understanding that parity had been accepted by the trustees in principle, and that implementation of the policy was a matter of immediate priority. Other members of the administration also believed that the Board of Trustees had adopted the principle of parity. Scheel's successor, President Walton, told a meeting of clerical faculty members that:

> The University *aims* to raise their salaries to parity: to 75% of parity in 1971-72; 85% in 1972-73; and 100% in 1973-74. (Italics added.)

This representation is reflected in the minutes of the June 6, 1970, Board of Trustees meeting. On November

23, 1970, President Walton, writing to two priest faculty members of a committee the trustees had appointed to review the parity issue, repeated the foregoing schedule and stated:

> Since the principle of parity has been accepted by the Board I do not believe that the Board intends to repudiate that principle.

The move toward parity ended abruptly on December 12, 1970, when, spurred by an influential trustee, the Board passed a "just compensation" resolution, which appellants characterize as, and appellee concedes was, a clear repudiation of parity as an official University policy.

Interpretation of the action taken by the Board of Trustees at the December 6-7, 1968, meeting is of great significance in evaluating appellant's claims. Clearly, Acting President Scheel and other administrators believed the University had committed itself to institute a parity salary scale, when feasible. The Administrative Bulletin is a publication compiled by the University's Office of the Provost, and is a general source of information for the University community. Its December 16, 1968, issue reported the following as to the Board's action at the December 6-7 meeting:

> After consideration of faculty salary proposals presented at a previous meeting, the Board (1) affirmed acceptance as a *goal* of the A-level standard of the American Association of University Professors and elimination of the present disparity between scales for clerical and religious and for lay members of the faculty; (2) directed that normal salary increments under the present scale should be continued during 1969-70; and (3) directed that, after such increments, funds remaining from increased tuition income should be used for salaries of new administrative and faculty personnel and for merit increments to present members of the faculty. (Italics added.)

Based upon the announcements and representations of University officials mentioned above, both appellants contend, *inter alia*, that Catholic University should be estopped from denying that the clerical scale would no longer be applicable in determining their salaries. Appellants also contend they should be found to have enforceable contracts which provide for salaries unaffected by the "clerical discount."

APPELLANT GRANFIELD

This district court was of the opinion that Father Granfield's strongest claim was based upon the doctrine of promissory estoppel. The elements of the promissory estoppel doctrine are authoritatively set forth in the Restatement, Contracts § 90 (1932):

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[8]

The Restatement formulation has been applied by this court. *See, e.g., N. Lotterio & Co.* v. *Glassman Construction Co.*, 115 U.S.App. D.C. 335, 319 F.2d 736 (1963).

The promissory estoppel doctrine of the Restatement would seem to erect four conceptual hurdles for appellant Granfield. First, did the statements of the University officials constitute a promise? If so, should the University have expected that appellant would rely on the announce-

[8] The Restatement 2d of Contracts (Tent. Draft #2) provides:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action by forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

ments, and "act" or "forbear" action of a definite and substantial nature? The next inquiry is whether the appellant actually relied on the promise to his detriment; that is, did he choose to remain at Catholic University instead of accepting opportunities elsewhere in reliance on the representation that he and the other clerics would receive a "parity" salary? Finally, the court must ask whether injustice can be avoided only by enforcement of the promise.

The district court found that Father Granfield could not reasonably have relied on the "amorphous statements" issued by the University as to parity. For example, the court noted that the Board of Trustees' Finance Committee report of December 6-7, 1968, spoke of parity as a desired *goal.* Acting President Scheel, on December 12, 1968, stated that the Board had approved a recommendation that parity be achieved *as soon as possible.* And on June 6, 1970, the Board was informed that President Walton had told the clerical faculty that the University *aims* to raise their salaries according to the reported timetable. The court rejected even the most definite statement made by President Walton as a sufficient basis for promissory estoppel,[9] viewing it as being limited to an expression of intentions rather than explicit promises, to be evaluated against a background of precatory statements concerning parity.

Although we may not have reached that result had this question come before us *de novo,*[10] we do not consider the

[9] See quotation *supra* at p. 6.

[10] The court's finding on the making of a promise is subject to review under the clearly erroneous standard. Rule 52(a), Fed.R.Civ.P. The question for the appellate court under Rule 52(a) is not whether it would have made the same findings as did the trial court, but whether the appellate court is left with the definite and firm conviction that a mistake has been committed. *Zenith Corp.* v. *Hazeltine,* 395 U.S. 100, 123, 89

district court's decision as clearly erroneous. As the district court found, "the statements issued by the University as to parity were often confusing and possibly contradictory." Its ruling that Father Granfield could not justifiably rely on these confusing statements subsumes a finding that no "promise" was ever made by appellee on which Granfield could rely; one of the elements of a "promise" is that it be "communicated in such a manner to a promisee that he may justly expect performance and may reasonably rely thereon.[11] Such a holding is not clearly wrong in the institutional context of this case. The University is not a commercial seller promising immediate delivery as soon as a specific missing part becomes available. The quality of indefiniteness in the institutional context is underlined by the statement of Acting President Nivard Scheel that parity will be achieved as soon as possible but not next year,[12] since the Board of Trustees' judgment had been that the parity goal could give way to other expenditure priorities considered more pressing. The University's undertaking on parity thus is accompanied by a reservation for determination of when parity would be reasonable in its institutional circumstances.[13] The district court found that this

S.Ct. 1562, ———, 23 L.Ed.2d 129 (1969); *see also United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, ———, 92 L.Ed. 746 (1948).

[11] Corbin defines "promise" as "an expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future, communicated in such a manner to a promisee that he may justly expect performance and may reasonably rely thereon." 1 *Corbin on Contracts* § 13 (1963).

[12] See discussion *supra,* at p. 6.

[13] *Cf.* 1 *Williston on Contracts* § 40 (3d Ed. 1957):

> A promise is not too indefinite for enforcement because of the use of such inexact words of definition of the time of performance as "immediately" [or] "as soon as possi-

undertaking lacked the specificity necessary for a promisee to justly expect and reasonably rely on performance, whether or not appellant relied in fact.[14]

It may well be that the district court was influenced in reaching its result of no promise generating justifiable reliance by its equitable obligation not to give effect to reliance unless necessary to avoid injustice. Equitable considerations properly include evaluation of the formality of the promise, whether there is a commercial setting and its nature, and whether there is unjust enrichment.[15] The plaintiffs could reasonably have expected change as a probability without thereby becoming justified in the kind of monetary outlay or equivalent reliance that generates contractual remedy. We are not persuaded that the district court has wrought injustice. Nor is there merit in the other theories advanced by appellant as regards his contractual or entitlement claims.

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ble" . . . since the general interpretation of such stipulation is, as quickly as is reasonable under the circumstances.

[14] The court also found that appellant Granfield did not demonstrate detrimental reliance of a definite and substantial nature. We are not required to review that finding.

[15] The Restatement of Contracts § 90, Comment (b) provides that:

> The promisor is affected only by reliance which he does or should forsee, and enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, or the formality with which the promise is made, on the extent to which evidentiary, cautionary, deterrent, and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as enforcement of bargains and prevention of unjust enrichment are relevant.

APPELLANT BRODERICK

In addition to the arguments advanced by Father Granfield, appellant Broderick sets forth certain relevant circumstances in support of his claims. Broderick was granted sabbatical leave for the academic year 1969-1970, and spent much of the period between January and June 1970 in Europe. While there, he corresponded with Clinton Bamberger, Dean of the Law School. It is evident from this correspondence that Father Broderick was seriously considering resignation. As the following recitation of their correspondence will manifest, Broderick was granted a salary increase and did return to the University.

Father Broderick argues that he reasonably interpreted the increase as an agreement to remove him from any clerical salary scale. The court below found otherwise; it was the court's conclusion that Broderick was promised only a salary increase—not a change of status, removing him from the clerical scale. The first relevant letter was written by Broderick on January 25, 1970. Dean Bamberger had requested the professor's comments in regard to the proposed budget, which scheduled the appellant's salary at $11,000. Broderick's response evidenced his displeasure with the proposed salary and stated, among other things, that he would prefer to preach, write, or teach theology or philosophy rather than teaching law under "second class citizen" conditions.

Dean Bamberger responded on January 29, 1970. He wrote:

> $11,000 is the maximum paid to University clerics under University policy. If I was not bound by that policy I would have recommended for you a salary of $21,500. That is the step at which you would be in the scale which I constructed to give me some rough guidance.

Bamberger further stated that he considered Broderick to be the very best professor at the law school, and that he wanted to do what he could to retain his services there. He concluded his letter with these comments:

> If what you are saying is that you are not willing to accept the reduced salary, then I am sorely distressed because you will force me to accept your loss for ours which I cannot control. I will stand behind you 100% in any forum in which you want to raise the issue of parity for clerics. I do not know what else I can do.

Broderick responded on March 27, 1970. Again he intimated that it was likely that he would not return to the University. He added:

> Furthermore, while I think the University's position on clerical salaries is vicious and demeaning to an educational institution—aside from its raw injustice—they do not need to change all that at once to meet my problem . . . No priest should be teaching at the non-Pontifical schools without being paid the same as any other human being there.

Broderick again wrote to Dean Bamberger on April 22, 1970. In this letter, Father Broderick reminded Bamberger that he had "told [him] over a year ago that the only reason [he] would leave C.U. would be a failure to come up with equalization." He spoke of being faced with "a serious moral decision."

The correspondence of greatest significance to appellant's promissory estoppel and contract claims was sent to Broderick by Bamberger on April 24, 1970. Stating that he was writing without taking time to review the correspondence and answer the points raised by appellant, Bamberger represented the following:

> . . . I have just firmed up your salary for next year and want to get the news to you as soon as possible. The salary for next year for you will be $20,100—*with no clerical discount.* (Italics added.)

Father Broderick argues that he interpreted—and in light of the preceding correspondence, was entitled to interpret—this representation as an agreement by the University to grant him parity, contending that it was plain from the language and tone of his letters that nothing less than parity would satisfy him and induce him to return. However, the trial court found that (a) the April 24th letter promised a salary increase, not a removal from the clerical scale; and (b) that Father Broderick could not have justifiably relied on the letter as a promise of parity. Further, the court, without making a specific finding on the issue, pointed out that it was doubtful that Dean Bamberger, or Provost Nuesse, had the authority to remove appellant from the clerical scale.

It appears completely understandable that appellant Broderick believed he had been granted parity; he had clearly expressed his moral objections to unequal treatment for priest-professors, and the April 24 letter stated that no clerical discount would be applied to his salary for the forthcoming academic year. However, certain of the appellant's earlier statements intimated that he might return to the University if steps were taken short of abolishment of the clerical scale.[16] In light of these

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[16] On one occasion, Father Broderick wrote to Dean Bamberger: "The double-talk from the University is just too much. I would almost be prepared to stay if Nuesse or Walton would sign his name to a paper (to you or me) that no cleric at the University is getting the magic ceiling mentioned by you. It just isn't true and they know it." In another communication, related earlier, wherein Father Broderick decried the injustice of the clerical discount, he commented: ". . . they do not have to change all that at once to meet my problem." In this same letter, Broderick added that if he returned under unchanged circumstances he would be personally committed to (a) working under protest, claiming he was legally entitled to full compensation; and (b) commencing action within the American Association of University Professors to force defendant to pay full compensation or be discredited.

intimations, the University could have concluded that a compromise, in the form of a salary increase, might induce the appellant to return to his teaching position and fight for the policy he abhorred from within. In any event, Dean Bamberger's letter is subject to the interpretation that the University was offering only a salary increase for the next academic year.[17] The trial court found that this was the case, and that appellee had no promise of parity.[18] Hence, the court rejected both the contract and promissory estoppel claims of appellant, and we conclude that the finding upon which the court's holding was based is not clearly erroneous.

FIRST AMENDMENT CONTENTIONS

Appellants Broderick and Granfield have fashioned arguments under the Religion Clauses of the first amendment by which they seek to have the court enjoin the operation of the clerical discount at Catholic University, whose status as a sectarian institution is unquestioned.[19]

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[17] The district court noted that his salary increase (to $20,100) was not the amount he had been informed he would be entitled to under a parity scale ($21,500). Also, the court emphasized that appellant, in his letter to Dean Bamberger of January 25, 1970, stated that he was waiting for final word "as to what my *salary* for 1970-71" will be. (Italics added.)

[18] The University has apparently chosen to freeze appellant Broderick's salary at the increased level.

[19] Until February 6, 1970, the University was governed by statutes, under which the University was strictly a pontifical institution, functioning under the direction of the Holy See. Thus, until 1968, the selection of the president of the University was subject to the approval of the Vatican, and all but a few of the University's Board of Trustees were members of the heirarchy of the Catholic Church.

In 1970, the statutes of the University were superseded with approval of the Holy See, by new by-laws. The Board

In many respects, the arguments rely on the interrelationship of the Religion Clauses.[20] For purposes of analysis, however, the contentions will be scrutinized separately.

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of Trustees now consists of 30 persons, 15 of whom are clerics, including five Cardinals. The local Ordinary, that is, the Archbishop of Washington, is *ex officio* the Chancellor of the University. As previously mentioned, three schools remain under pontifical direction: the Schools of Theology, Philosophy and Canon Law.

The University derives approximately forty-three percent of its income from student and tuition fees. Approximately twenty percent of annual revenue comes from gifts and grants—primarily acquired through diocesan collections conducted by Catholic bishops. Much of the remaining funding is derived from governmental sources.

The involvement and influence of the Catholic Church at Catholic University is obvious; in light of the above factors, we feel completely justified in characterizing Catholic University as a sectarian institution.

Moreover, all parties to this appeal point up the sectarian character of the University—though for different reasons. Appellants argue, *inter alia*, that the government's partial funding of the University, as a church-related institution, amounts to the establishment of a religion—but only for so long as the University allegedly penalizes appellants' free exercise of religion *qua* priests by reducing their salaries *qua* professors. The University contends, as appellee, that none of the governmental aid is in violation of the establishment Clause; that by reason of the University's sectarian nature, any governmental interference with the University's policy of paying its priest-professors at a reduced scale, based on considerations of church policy, would be a violation of the *University's* free exercise rights.

[20] The First Amendment provides, in pertinent part, that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

The Establishment Clause

In suggesting that the government grants to Catholic University violate the Establishment Clause, the appellants present serious allegations of impermissible entanglement between church and state, for the lawful bounds of aid to sectarian institutions are narrowly drawn. *See, e.g., Meek* v. *Pettinger,* 421 U.S. 349 (1975), and cases therein cited. Thoroughly documenting Catholic University's receipt of funds from the Government, and other governmental relationships,[21] the appellants argue that, *so long as the University subjects its cleric-professors to a discriminatory wage scale,* it violates the mandates of the Establishment Clause.[22] Thus, while appellants are willing to construct an argument which includes the Establishment Clause as a constituent element, it is to be noted that they seek only incomplete and transitory enforcement of the prohibitions of the clause. We observe, for example, that no official of the government responsible for the administration of grants to appellee Catholic University has been made a party

[21] Approximately twenty-five percent of Catholic University's annual income comes from the United States Government, as grants for instruction and research, funds for student aid, interest grants on notes, and reimbursement for indirect notes. Further support for appellants' government action argument is seen in the University's federal tax exemption as an educational institution and its eligibility to receive deductible contributions.

[22] The Supreme Court has written much concerning government aid or assistance to parochial and private schools. *See generally Meek* v. *Pittenger, supra; Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973); *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973); *Sloan* v. *Lemon,* 413 U.S. 825 (1973); *Norwood* v. *Harrison,* 413 U.S. 455 (1973); *Hunt* v. *McNair,* 413 U.S. 734 (1973); *Tilton* v. *Richardson,* 403 U.S. 672 (1971); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Everson* v. *Board of Education,* 330 U.S. 1 (1947).

to the litigation.[23] Neither have the appellants sought a *permanent* injunction directed toward the government or the University, or both, to prohibit continuation of the partial government funding of the institution, although injunctive relief of this type is ordinarily regarded as the appropriate remedy when such aid to a church-related educational body is in issue.[24] Moreover, appellants seek a ban against only one specific practice at the University, notwithstanding that other policies pursued by it might be equally suspect under close scrutiny for Establishment Clause transgressions.[25]

Since it fitted their theory of recovery, appellants did make the record crystal clear that the moneys received by the University from the government are treated as unrestricted funds by the former, thereby demonstrating that some of the government funds find their way

[23] Neither the Secretary of Health, Education, and Welfare nor the Commissioner of Education was made a party. The Office of Education, created by 20 U.S.C. Sec. 1221 c(a), is, in the statutory language, "the primary agency of the Federal Government responsible for the administration of the programs of financial assistance to educational agencies, institutions and organizations." The Office is "headed by the Commissioner of Education . . . who shall be subject to the direction and supervision of the Secretary [of Health, Education and Welfare]." 20 U.S.C. § 1221c(b). *Cf. Provident Tradesmens Bank and Trust Co.* v. *Patterson,* 390 U.S. 102, 111 (1968); *Brown* v. *Christman,* 75 U.S. App. D.C. 203, 126 F.2d 625, 631-632 (1942); *Boles* v. *Greenville Housing Authority,* 468 F.2d 476 (6th Cir. 1972).

[24] *See, e.g., Committee for Public Education* v. *Nyquist, supra.*

[25] Appellants' position that the federal aid runs afoul of the Establishment Clause only while the clerical discount remains in effect ignores the fact that Catholic University would remain a religious institution even if the discount is eliminated, and that the funds in issue are used for purposes other than faculty salaries.

into faculty salaries. Otherwise, however, they made little effort to disprove that the public grants are being utilized by the University "exclusively for secular, neutral, and nonideological purposes." *Committee for Public Education* v. *Nyquist*, 413 U.S. at 780. Nor did appellants make manifest whether "an excessive government entanglement with religion" exists, *Walz* v. *Tax Commission*, 397 U.S. at 675 (1970), or if there is a failure by appellee and government officials "to guarantee the separation between secular and religious functions and to ensure that . . . financial aid supports only the former," *Lemon* v. *Kurtzman*, 403 U.S. at 613. Such a showing would be at the heart of any constitutional violations that might exist.

It is extremely meaningful that the appellants and appellee do not have adverse views as to the propriety of the government grants *per se*. Appellee Catholic University obviously welcomes the aid. The appellants disapprove of the University's receipt of the grants only in the narrow and contingent circumstances presented by their contentions before this court, for their briefs make it all too apparent that their professed opposition to government aid to the University will exist only for so long as it maintains the policy of denying them pay equal to that of their secular peers.[26] The manifest willingness of the appellants to become apostates from their claim under the Establishment Clause thus undermines their fitness to bring it before this Court in an adversary manner.

Under the terms of Article III, Section 2 of the Constitution, a federal court may act only in "cases" and "controversies". It is clear that "(t)he controversy must be definite and concrete, touching the legal relations of

[26] This point is particularly illustrated by appellant Granfield's brief, which raises the Establishment issue solely as an underpinning of his Free Exercise contentions.

parties having *adverse* legal interests." (Italics added.) *Aetna Life Ins. Co* v. *Haworth*, 300 U.S. 227, 240-241 (1937). In *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971), the Court dismissed an appeal wherein appellants had sought review of a three-judge district court's decision that a portion of a North Carolina anti-busing statute was unconstitutional.

> At the hearing both parties argued to the court that the anti-busing law was unconstitutional * * * We are thus confronted with the anomaly that both litigants desire precisely the same result, namely, a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Art. III of the Constitution. *Muskrat* v. *United States*, 219 U.S. 346 (1911).

Id. at 47-48.

The situation with which this Court is confronted is more clouded than that faced by the Supreme Court in the *Charlotte-Mecklenburg* case. Appellants, rather than conceding the lack of dispute, have, in fact, created legal theories leading to the relief they desire. Nevertheless, it is clear that, although appellants purport to raise Establishment issues, they are devoid of a genuine, undeviating and wholehearted contrariety to the establishment of a religion at the University, insofar as it may be accomplished by a continuation of government aid to the institution. There is, therefore, a want of that concrete adverseness "which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). *See Flast* v. *Cohen*, 392 U.S. 83 (1968). We are impelled to conclude, then, that sound principles of judicial restraint warrant no further consideration of this important constitutional issue.[27]

[27] This holding is not explicitly mandated by the juridiction requirements of "case or controversy." However,

Free Exercise Clause

In setting out his Free Exercise claim, appellant Granfield argues that

> public aid to a university the management of which is . . . infused with religious considerations, is suspect under the Establishment Clause . . . [P]ublic aid is impermissible to a university that maintains a policy of keeping a substantial number of its faculty under religious discipline and control. *Any* aid to the University must run afoul of the Establishment Clause so long as this policy is maintained. It follows that this Court can enjoin [the University from] the maintenance of the clerical scale as an invasion of [appellants'] Free Exercise Rights so long as any public funds flow to the University.

To the extent that appellant Granfield's claims rely on our finding an Establishment Clause violation, they must be disallowed for reasons stated earlier.

"[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . ." *Poe* v. *Ullmann,* 367 U.S. 497, 508 (1961). The court noted in *McCahill* v. *Borough of Fox Chapel,* 438 F.2d 213, 215 (3d Cir. 1971), the following:

> Although this inquiry has commanded the attention of the Supreme Court both before and since the passage of the Federal Declaratory Judgment Act, the standards by which cases and controversies are distinguished from claims premature or insufficiently adverse are not susceptible of ready application to a particular case.

To the extent that it can be said that the parties have "adversary" positions, it is on a slight, incremental point—that even assuming the government is not involved in the religious auspices of the university through its funds and contracts, it becomes involved in the religious establishment because of the salary discount for clerical (as opposed to lay Catholic) members of the faculty. That point is without substance in our view, for reasons in large part indicated in our discussion of the internality aspect of the Free Exercise claim (pp. 23-25).

Both appellants present alternative theories under which they seek relief pursuant to the Free Exercise Clause. Appellant Broderick utilizes the traditional government action theory (equivalent to state action in a fourteenth amendment context) to align the University's program of reduced pay scales for priest-professors with governmental policy. The government action label has been pressed against the conduct of appellee in the recent past. *Spark* v. *Catholic University,* ——— U.S. App. D.C. ———, 510 F2d 1277 (1975).[28] While certain additional factors relevant to government contacts with the University are presented in this appeal, the *Spark* decision would seem to control as to the claims of government action presented by appellant Broderick. *See also Greenya* v. *George Washington University,* ——— U.S. App. D.C. ———, 512 F2d 556 (1975). However, as appellants point out, these holdings are subject to the significantly broader restraints concerning state action in the field of racial discrimination.[29] Reasoning from this, they argue that the Religion Clauses are "preferred freedoms", and that the court accordingly should adopt a similar standard in

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[28] In *Spark,* the Court had before it most of the government action factors which have been presented to this court. The appellant had alleged a first amendment "free expression" claim, and the court refused to find that the state involvement was sufficient to sustain federal jurisdiction.

[29] It has increasingly become clear that, with respect to racial discrimination, courts are willing to condone less state involvement than would be permitted in other contexts. *See, e.g., Greenya* v. *George Washington University, supra,* ——— U.S. App. D.C. at ———, 512 F.2d at 560; *Greco* v. *Orange Memorial Hospital Corp.,* 513 F.2d 873 (5th Cir. 1975); *Coleman* v. *Wagner College* 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring); *Powe* v. *Miles,* 407 F.2d 73, 82 (2d Cir. 1968). Commentators have noted this distinction. *See* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity,* 74 Colum. L. Rev. 656, 661 (1974); Comment, *State Action and the Burger Court,* 60 Va. L. Rev. 840, 850 (1974).

the context of claims of interference with the free exercise of religion as that existent in cases involving invidious racial distinctions.[30] However, as hereafter shown, we find it unnecessary to resolve the issue as framed by appellants.

"[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual . . ." *Sherbert* v. *Verner,* 374 U.S. 398, 412 (1963) (Douglas, J., concurring). The first amendment's proscription becomes specifically applicable when government attempts by law or other means to affect the freedom of those within a particular religious creed. *See, e.g., Cruz* v. *Beto,* 405 U.S. 319 (1972); *Sherbert* v. *Verner, supra; Murdock* v. *Pennsylvania,* 319 U.S. 105, 108 (1934). The first amendment becomes relevant to a private institution's attempts to infringe upon the freedom of an individual to practice his religion only when a governmental entity is shown to have become significantly involved in the discrimination practiced by it. *See Golden* v. *Biscayne Bay Yacht Club, supra,* at 351, n. 18. Here, however, we have only the case of a particular religion,

[30] Such a view was adopted by the court in *Golden* v. *Biscayne Bay Yacht Club,* 521 F.2d 344 (5th Cir. 1975). In *Golden,* it was held that a private yacht club's discriminatory racial and religious membership policies were within the proscription of the Fourteenth Amendment. As to the claim of religious discrimination, the court commented as follows:

> We believe, in this context, religious discrimination against the Jewish applicant carries the same stigma of inferiority and badge of opprobrium that is characteristic of racial discrimination. Accordingly, we apply the well developed standards utilized in the racial discrimination setting to both litigants, for the gravity of the harm is exactly the same as to both plaintiffs and there exists no rational basis for distinguishing between them by allowing relief as to one while denying it to the other. (Footnotes omitted.)

Id. at 351.

through an affiliated educational institution, being charged with discriminating against certain of its own members, by those same members.[31]

We are thus not disposed to adopt the arguments of appellants. The salary scale for priests in a church-related institution clearly appears to be an internal matter of the religious institution affected. In other contexts, courts have traditionally refused to become involved in the resolution of internal religious questions.[32]

[31] Appellants contend that the special pay scale diminishing their salaries because they are clerics represents the same type of sanction upon their free exercise of religion as would a fine levied against them for being Catholic priests.

[32] *Cf. Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969); *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S.94, 115 (1952); *Gonzales* v. *Roman Catholic Archbishop,* 280 U.S. 1 (1929); *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679 (1872); *Kings Garden, Inc.* v. *F.C.C.,* ——— U.S. App. D.C. ———, 498 F.2d 51, 56 (1974) *cert. denied* 419 U.S. 996 (1974); *Simpson* v. *Wells Cement Corp.,* 494 F.2d 490 (5th Cir. 1974).

Justice Brennan, concurring in *Abington School District* v. *Schempp,* 374 U.S. 203, 243 (1963) discussed the "internality doctrine":

> One line of decisions derives from contests for control of a church property or other internal ecclesiastical disputes. This line has settled the proposition that in order to give effect to the First Amendment's purpose of requiring on the part of all organs of government a strict neutrality toward theological questions, courts should not undertake to decide such questions. These principles were first expounded in the case of *Watson* v. *Jones,* 13 Wall, 679, which declared that judicial intervention in such a controversy would open up "the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination . . ." 13 Wall, at 733. Courts above all must be neutral, for "[t]he law knows no heresy, and is

Since we have concluded that the basic dispute is between sectarian authorities and members of the church's own religious orders,[33] the clerical discount here in issue does not involve the sort of restraint which is suspect under the Free Exercise clause, for there is simply no private infringement of religious freedom to impute to the government.[34] The appellants' reduced salaries were set by an arm of their own religious organization, for the advancement of its own ecclesiastical objectives. Under these circumstances, a conclusion that appellants' Free Exercise rights were somehow violated by the government would be a paralogism.

Accordingly, we find the Free Exercise claims of appellants to be without merit. The wisdom—or lack there-

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committed to the support of no dogma, the establishment of no sect. 13 Wall at 728.

See also Note, *Judicial Intervention in Disputes Over the Use of Church Property,* 75 Harv. L. Rev. 1142 (1962); Comment, *Judicial Intervention in Disputes Within Independent Church Bodies,* 54 Mich. L. Rev. 102 (1955); Comment *The Power of Courts Over the Internal Affairs of Religious Groups,* 43 Calif. L. Rev. 322 (1955).

Courts have, on occasion, involved themselves in ecclesiastical affairs where a compelling governmental interest in the regulation of public health, safety and general welfare has demanded court attention. *See, e.g., Wisconsin* v. *Yoder, 406* U.S. 205 (1972); *Gillette* v. *United States,* 401 U.S. 437 (1971); *Braunfield* v. *Brown,* 366 U.S. 599 (1961).

[33] The origin and purpose of the clerical discount is discussed in n. 3. *supra.*

[34] "The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District* v. *Schempp, supra,* at 222-223 (1963).

of—of the salary policy in question must be resolved within the confines of the religious body involved. We expressly pretermit consideration of any other grounds raised by appellants, finding them likewise to be meritless.

Affirmed.

APPENDIX A-1

APPENDIX A-1

Judgment of the United States Court of Appeals for the District of Columbia Circuit dated January 29, 1976.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

No. 74-1151 Civil 1535-71

DAVID J. K. GRANFIELD, APPELLANT

v.

THE CATHOLIC UNIVERSITY OF AMERICA,
A DISTRICT OF COLUMBIA CORPORATION

No. 74-1152 Civil 1534-71

JOSEPH A. BRODERICK, APPELLANT

v.

THE CATHOLIC UNIVERSITY OF AMERICA,
A DISTRICT OF COLUMBIA CORPORATION

Appeals from the United States District Court
for the District of Columbia

Before: BAZELON, Chief Judge, LEVENTHAL, Circuit Judge and JUSTICE,* United States District Judge for the Eastern District of Texas

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from in these

causes are hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Robert A. Bonner
Robert A. Bonner
Clerk

Date: January 29, 1976
Opinion for the Court filed by District Judge Justice.
*Sitting by designation pursuant to 28 U.S.C. § 292(d)

APPENDIX B

APPENDIX B

Memorandum of the United States District Court for the District of Columbia dated October 17, 1973 (365 F.Supp. 147 (1973)).

United States District Court, District of Columbia.

Joseph A. Broderick, Plaintiff, v. Catholic University of America, Defendant (Civil No. 1534-71); and David J. K. Granfield, Plaintiff, v. Catholic University of America, Defendant (Civil No. 1535-71).

MEMORANDUM

GASCH, *District Judge.*

This is a consolidated civil action brought by two priests against the Catholic University of America where they are both employed as professors in the Columbus School of Law. The central issue revolves around the policy of the defendant University in paying clerical members of their faculty a lesser salary than that of lay faculty. Based upon numerous theories of law, each plaintiff seeks, essentially, to have the Court end this "clerical discount" as applied to them. Before reaching the plaintiffs' factual and legal claims, the Court will set forth the factual background in which this controversy arose.

I. Factual Background.

The Catholic University of America until recently was a pontifical university functioning under the direction of the Holy See.[1] However, between 1967-1970 all but

[1] Prior to 1968, the selection of the University president was subject to the approval of the Vatican and all members of the Board of Trustees were members of the hierarchy of the Catholic Church. Transcript at 108-112 (all references to the trial transcript will hereinafter be denoted by a capital T).

three schools of the defendant University have become independent of the Holy See.[2] Thus, but for a few remaining vestiges of its past governance by the Catholic hierarchy,[3] the Catholic University functions essentially as most other American institutions of higher education. Nevertheless, one of the remaining practices is the utilization of a "clerical scale" which in application allows those members of the faculty who are clergy or religious a lower salary than lay faculty members. At the present time there are only two members of the law school faculty who are clerics and to whom this "scale" is applicable. These two faculty members, Father Joseph Broderick and Father David J. K. Granfield, are the plaintiffs in this case. Both plaintiffs have received tenure.

It appears clear from the testimony and exhibits that the elimination of parity has been an issue which has received varying degrees of consideration over the years. As early as 1945, at a meeting of the executive committee of defendant's Board of Trustees, a revised faculty scale was proposed which would, within four years and when fully implemented, put clerical and religious members of defendant's faculty on a basis of salary parity with lay members of its faculty. The revised scale was adopted and put into effect for lay members of the faculty, but not for clerical and religious members.[4] This pattern of

[2] The three schools still remaining under pontifical direction are the schools of Theology, Philosophy, and Canon Law. Plaintiff Broderick's Proposed Findings of Fact number 29.

[3] One half of the Board of Trustees are clerics, of which five are Cardinals. There are in addition other strong ties to the Roman Catholic Church within the structure of the University but these are extraneous for the most part to the question at issue.

[4] Exhibit 4d — Minutes of the Board of Trustees, January 12, 1945. In addition, the executive committee of the Board of

indecision and movement in regard to parity resulted in several statements and announcements, and resolutions over the years which are critical to plaintiffs' claims in this case.

First, on February 8, 1968, the defendant's Academic Senate[5] adopted a resolution that the Academic Senate request defendant's Board of Trustees to adopt a policy of parity of salaries between clerical and religious members and lay members of defendant's faculty and to "implement this policy *without delay*."[6] (Emphasis added).

Subsequently, on September 12, 1968, Mr. Hickey of the Finance Committee of the Board of Trustees reported that his committee "*favored* putting the salaries of clerical members of the faculty on a parity with lay members."[7]

Trustees considered a petition that parity be extended for the clerical and religious faculty in January of 1965 with only an adoption of a 20% increase for the clerics and religious faculty resulting. Exhibit 4f — Minutes of the Board of Trustees, April 28, 1965. Again in 1966 a committee was appointed to study a request for salary increases for the priest-professors of up to 70% of parity. Exhibit 4h — Minutes of the Board of Trustees, November 13, 1966.

[5] The Academic Senate is a body composed of members of the administration, including the president, vice-president, and deans in addition to the representatives chosen by the faculty of the various schools and departments. The Senate shares with the president the responsibility for the *academic* governance of the University. T at 26-27. It is significant that the direction and management of affairs of the University are controlled by the Board of Trustees, Exhibit 12, Documents of the Catholic University of America at 2.

[6] Exhibit 5a, Minutes of the Academic Senate, February 8, 1968.

[7] Exhibit 41, Minutes of the Board of Trustees, September 12, 1968.

(Emphasis added). Similarly, on December 6-7, 1968, the Finance Committee and the Academic Affairs Committee both wished

> to go on record as still considering the *desired goal* (emphasis added) in faculty salaries to be the A level of the AAUP [American Association of University Professors] scale—not *Plan A*—including, eventually, placing the salaries of clerical members of the faculty on a parity with lay teachers.
>
> The Committees, however, faced the straitened 1969-70 financial situation. Its realities make it impossible to implement Plan B as submitted by the Academic Senate.[8]

The Committees at this meeting recommended that the present salary scale be kept, and the sums available be used for new personnel and merit increments for members of the faculty. These recommendations were approved.[9]

Following this December 6-7, 1968, meeting of the Board of Trustees, there were many interpretations of exactly what the Board of Trustees had accepted as a matter of policy. The *Administrative Bulletin* of December 16, 1968, a publication emanating from the Office of the Provost and a general source of information to the University community, reported that

> after consideration of faculty salary proposals presented at a previous meeting, the Board (1) affirmed acceptance *as a goal* of the A-level standard of the American Association of University Professors and elimination of the present disparity

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[8] Exhibit 4m, Minutes of the Board of Trustees, December 6-7, 1968.

[9] *Id.*

> between scales for clerical and religious and lay members of the faculty; (2) directed that normal salary increments under the present scale should be continued during 1969-70; and (3) directed that after such increments, funds remaining from increased tuition income should be used for salaries of new administrative and faculty personnel and for merit increments to present members of the faculty.[10] (Emphasis added).

This interpretation of the Board of Trustees' action appears to follow accurately the minutes of the Board of Trustees December 6-7, 1968, meeting. However, Acting President Nivard Scheel at a December 12, 1968, meeting of the Academic Senate reported that the Board of Trustees, with respect to faculty salaries,

> approved a recommendation submitted jointly by its Committees on Academic Affairs that the AAUP "A" scale, and parity of clerical and lay salaries be achieved *as soon as possible*. However, because of limited revenues, "Plan B" cannot be achieved next year. Income from the rise in tuition will therefore be used to a) maintain present salary scale, b) permit recruitment of new administrative and faculty personnel, and c) allow for merit increases to selected members of the faculty.[11]

From the foregoing facts plaintiffs argue that the University community and even the administration believed that "defendant's board of trustees had accepted the principle of parity of salaries" although admittedly there were questions with respect to the "speed of imple-

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[10] Exhibit 6a, *Administrative Bulletin,* December 16, 1968.

[11] Exhibit 5b, Minutes of the Academic Senate, December 12, 1968.

mentation of the *goal* which the administration announced had been adopted."[12] (Emphasis added). In further support of this argument, plaintiffs both point out the meeting of President Walton with the priest-faculty members at Curley Hall. At this meeting, as reported to the Board of Trustees by President Walton, the priest-professors were told by President Walton that

> the University *aims* to raise their salaries to parity: to 75% of parity in 1971-72; 85% in 1972-73; and 100% in 1973-74. To do this, [President Walton] said, will increase the University's financial problems by some $300,000 as against the $80,000 deficit Curley Hall dining hall shows annually.[13] (Emphasis added).

II. Promissory Estoppel.

Within this factual context, the strongest of both plaintiffs' arguments appears to be that the defendant, on the grounds of promissory estoppel, should be estopped from denying that both plaintiffs had been removed from the clerical scale due to representations made by the defendant through its administrators and Board of Trustees and justifiably and detrimentally relied upon by plaintiffs. Since plaintiff Broderick has an additional

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[12] Proposed Findings of Fact of Plaintiff Broderick, numbers 83, 84. Additionally, with respect to the implementation of parity, Provost Nuesse, in rejecting Father Broderick's request for a full salary during his sabbatical leave in 1969-70, stated:

> . . . I *hope* that the dual scale of salaries can be eliminated within the next year or two so that this kind of problem will not recur. (Emphasis added).

Exhibit 10bb, Letter of Provost Nuesse to Acting Dean Rohner, June 16, 1969.

[13] Exhibit 4n, Minutes of the Board of Trustees, June 6, 1970.

basis for his promissory estoppel arguments, his contentions will be dealt with after those of Father Granfield.

A. Father Granfield.

Father Granfield is a professor of law at defendant Columbus School of Law where he has been on the faculty since 1960.[14] As noted previously, Father Granfield is paid on the "clerical scale" which results in his salary being approximately 50 percent of the median salary paid to other full professors at the Law School.[15]

Father Granfield's promissory estoppel argument is based upon the representations made by the administration, especially that of Acting President Nivard Scheel that parity would be achieved "as soon as possible," and the actions and announcements of the Board of Trustees.[16]

The Restatement of Contracts, § 90, most succinctly sets forth the elements of promissory estoppel.

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[17]

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[14] Father Granfield graduated from Harvard University Law School in 1947 and has published a casebook and numerous legal articles.

[15] T at 342.

[16] See *supra*, note 11, and notes 4, 6, 7, 8, 9, and 10 and accompanying text.

[17] The Restatement Second of Contracts (Tent. Draft #2) sets out Section 90 as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

See generally 1 Williston, Contracts § § 139-140 (3d ed. 1957). *Union Mutual Life Insurance Co.* v. *Mowry*, 96 U.S. 544 (1877).

The Court considers the statements issued by the University as to parity were often confusing and possibly contradictory. Nevertheless, upon careful review of these pronouncements, this Court cannot find that Father Granfield could have justifiably relied upon these statements. Comment b of § 90 of the Restatement addresses this point by noting:

> The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which evidentiary, cautionary, deterrent, and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as enforcement of bargains and the prevention of unjust enrichment are relevant.[18]

In the factual setting previously set forth, it is clear that Father Granfield's reliance in the context of promissory estoppel on amorphous statements that included such wording as "desired goal",[19] "as a goal",[20] and "as

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[18] See *Curtiss Candy Co.* v. *Silberman*, 45 F.2d 451, 453 (6th Cir. 1930). 1 Williston, Contracts § 140 (3d ed. 1957).

[19] See *supra*, note 8 and accompanying text.

[20] See *supra*, note 10 and accompanying text.

soon as possible",[21] was not justified. The most definite statement emanated from President Walton where he set forth the specific intentions of the University.[22] Again, however, President Walton spoke only of intentions and in light of the stance of the Board of Trustees and the past precatory working of all statements concerning parity, this Court concludes that Father Granfield's promissory estoppel claim must fail when viewed under the scrutiny of all the surrounding circumstances.[23]

B. Father Broderick.

Father Joseph Broderick, a priest in the Dominican Order of Preachers, is a tenured professor of law and, like Father Granfield, is a well-respected member of the Law School faculty.[24] Although Father Broderick bases his promissory estoppel claim on many of the same grounds as Father Granfield, Father Broderick has an additional basis which involves a very difficult and, in a factual sense, very different question. To the extent that Father Broderick's promissory estoppel claims are

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[21] See *supra*, note 11 and accompanying text.

[22] See note 13, *supra*, and accompanying text.

[23] Moreover, this Court fails to find any real reliance by Father Granfield. The fact that plaintiff Granfield was "approached" by Professor Katz of the Boston College of Law does not illustrate to this Court from the information presented that there was either a preliminary offer for Father Granfield to take employment elsewhere or that Father Granfield did not leave Catholic University because of his reliance on a "promise" of parity from defendant. *Cf. Goodman* v. *Dicker*, 169 F.2d 684 (D.C. Cir. 1948). see *Dickerson* v. *Colgrove*, 100 U.S. 578, 580 (1879).

[24] Father Broderick received his A.B. degree from Princeton University and an LL.B. degree from Harvard University. After ordination, Father Broderick received an S.J.D. degree from Harvard and a doctoral degree from Oxford University.

grounded on the same principles as those of Father Granfield, they must be rejected on the findings and conclusions previously outlined. In regard to Father Broderick's additional claim the facts are as follows.

Between January 25 and April 24, 1970, Father Broderick and Clinton Bamberger, Dean of the Law School, corresponded with one another concerning plaintiff Broderick's request for an increased salary. It is evident that Father Broderick was contemplating resignation if his *salary* was not increased for the school year 1970-71.[25] In response to Father Broderick's request for a salary increase, Dean Bamberger wrote:

> $11,000 is the maximum paid to University clerics under University policy. If I was not bound by that policy I would have recommended for you a salary of $21,500. That is the step at which you would be in the scale which I constructed to give me some rough guidance.[26]

The critical letter upon which Father Broderick bases his promissory estoppel and contract claims is the letter of April 24, 1970, from Dean Bamberger to Father Broderick. This letter reads in relevant part:

> . . . I have just firmed up your salary for next year and want to get the news to you as soon as possible.

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[25] Exhibit 10d, Letter of Father Broderick to Dean Bamberger, January 25, 1970. In this letter Father Broderick informed Dean Bamberger:

> I will not submit a resignation herewith. But I will promise you an immediate response when I receive final word from you as to what my *salary* for 1970-71 is finally determined to be (emphasis added).

[26] Exhibit 10G, Letter from Dean Bamberger to Father Broderick, January 29, 1970.

> The *salary* for *next year* for you will be $20,100 —*with no clerical discount*.[27] (Emphasis added).

Plaintiff Broderick's argument is that he returned to Catholic University to teach in reliance upon this salary increase which he interpreted as an agreement to grant parity by defendant.[28] Father Broderick has argued that the April 24, 1970 letter which spoke of $20,100 with "no clerical discount" is subject to two interpretations and he interpreted it as a grant of parity. However, it is the opinion of this Court in view of the surrounding circumstances and the past history of the parity issue at the defendant University, that the April 24 letter was referring only to a salary increase, not a change of status removing Father Broderick from the clerical scale.

In addition, the Court finds that Father Broderick could not have justifiably relied[29] on this letter as a basis for believing he had been granted parity. Father Broderick was informed on January 29, 1970, that his salary would be $21,500, not $20,100 if he was to be removed from the "clerical scale." Furthermore, the Provost, Dr. Nuesse, has testified that it was his view that only an exception had been granted to Father Broderick and not his placement on the lay scale.[30] This

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[27] Exhibit 10a, Letter from Dean Bamberger to Father Broderick, April 24, 1970.

[28] T at 73. Without deciding the question whether Dean Bamberger or Provost Nuesse had the power to grant Father Broderick's request to be removed from the clerical scale, it appears to the Court that the Dean traditionally acted as the representative of the faculty member in contract negotiations not as the spokesman for the defendant's view. Moreover, Dr. Nuesse testified that even he did not have the authority to remove a priest-professor from the clerical scale. T at 538-39.

[29] See *supra*, note 18 and accompanying text.

[30] T at 269, 524-525.

appears to be the correct interpretation of the April 24 letter. Thus, the language "no clerical discount," as noted previously, applied only to plaintiff Broderick's salary, not his status. In his letter to Dean Bamberger of January 25, 1970, it is also noteworthy that Father Broderick was waiting for final word "as to what my salary for 1970-71" will be,[31] not whether he would be placed on the lay scale. The Court concludes, therefore, that Father Broderick's promissory estoppel claim must be rejected for the reasons stated.

II. Contract.

The contract claims of each plaintiff are based on essentially the same fact patterns as the promissory estoppel arguments. However, it is alleged that the breach of the contract to grant parity, which arose from all the statements of the administration and the Board of Trustees, occurred on December 12, 1970, when the Board of Trustees passed a resolution basically reaffirming the principle of the clerical scale.[32]

Without reviewing each pronouncement and each letter once more, it is the holding of the Court that no contract to grant parity ever arose between plaintiffs and defendant. Due to the ambiguous nature of the announcements, resolutions, and letters, it can only be held that there was no meeting of the minds of the parties and no real agreement demonstrating offer and acceptance ever in fact existed. 1 Williston on Contracts § § 17-21 (3d ed. 1957); *Zell* v. *American Seating Co.*, 138 F.2d

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[31] See *supra*, note 25.

[32] This resolution, Exhibit 4p, December 14, 1970, was the subject of much controversy due to its ambiguous wording but was finally interpreted by a special Ad Hoc Committee of the Academic Senate to be a repudiation of parity.

641, 646 (2d Cir. 1943). Moreover, from the facts before the Court it is clear that there was only a "mere expression of intention" on the part of the defendant that did not amount to an offer that could in any manner be accepted by plaintiffs. 1 Williston on Contracts § 26 (3d ed. 1957). In the language of Justice Holmes:

> On the face of it, it does not import a legally binding promise, but rather a hopeful encouragement, sounding only in prophecy.

Hall v. *First National Bank of Chelsea,* 173 Mass. 16, 53 N.E. 154, 155 (1899).

III. Constitutional Claims.

Both plaintiffs assert numerous constitutional claims asserting a violation of the First and Fifth Amendments of the Constitution. Essentially, plaintiffs argue that due to the United States Government's involvement in the defendant, through tuition grants, research and instruction grants, Congressional chartering, and defendant's tax exemption as an educational institution, there is sufficient governmental involvement ("state action") to bring into play the clauses of the Bill of Rights which limit the impingement by governmental action upon individual rights. The Court does not agree.

In regard to the amount of federal funds flowing to the University, it is clear that without further direct involvement in the affairs of the defendant, no governmental action exists. In the case of *Grossner v. Trustees of Columbia University,* 387 F. Supp. 535 (S.D.N.Y. 1968), the District Court was met with very similar claims of violations of constitutional rights by Columbia University's disciplinary proceedings against students involved in building depredations. Although the case addressed

principally the use of state funds[33] by Columbia University, the language is clearly analogous to the issue presented to this Court. In deciding this point, the *Grossner* Court stated:

> A more fundamental point against plaintiffs is that receipt of money from the State is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government. Otherwise, all kinds of contractors and enterprises, increasingly dependent upon government business for much larger proportions of income than those here in question, would find themselves charged with "state action" in the performance of all kinds of functions we still consider and treat as essentially "private" for all presently relevant purposes. See *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F.2d 959 (4th Cir. 1963), *cert. denied,* 376 U.S. 938 (1964).

287 F. Supp. at 547-48.

Grossner, additionally, noted that the test of *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725 (1961), was how far the state "insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity." 365 U.S. at 725.

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[33] In 1966, $49,500,000 out of the $117,500,000 income of Columbia University came from public funds. Similarly, in 1967, $59,700,000 of a total of $134,300,000 came from public funds. In our case the defendant in the fiscal year ending 1968 received 24.9 percent of all its income from the Federal Government. In the fiscal year of 1970 defendant received 25.8 percent of its income from the United States Government and 24.6 percent in fiscal 1971.

It is apparent to this Court that the Federal Government has in no substantial respect insinuated itself into any form of interdependence with Catholic University. Although money and tax considerations are given to defendant, this is a far cry from any influence on policy or decision-making or the encouragement of any specific policy. Therefore, as to whether there is "governmental action" due to the influx of Federal funds, the Court finds there is not.

The plaintiffs' arguments in relation to tax exemptions and government chartering and government action are equally without merit. The Sixth Circuit recently was confronted with a similar issue in *Blackburn* v. *Fisk University*, 443 F.2d 121 (1971). The plaintiffs were students at the University and were suspended without a hearing. Fisk University is a privately endowed university under a charter granted by the State of Tennessee and exempt from state and local taxes. The court, in rejecting plaintiffs' allegation that university action was tantamount to "state action," held:

> State involvement sufficient to transform a "private" university into a "State" university requires more than merely chartering the university, *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 . . . , providing financial aid in the form of public funds, *Grossner* v. *Trustees of Columbia University*, 287 F. Supp. 535 (S.D.N.Y.); or granting of tax exemptions, *Brown* v. *Mitchell*, 409 F.2d 593 (10th Cir.).

443 F.2d at 123.

Thus, plaintiffs' allegations of "governmental action" must be rejected. Since there is no governmental action, the constitutional claims of plaintiffs need not be specifically discussed.

In conclusion, all other claims of plaintiffs have been found to be without sufficient substance to warrant detailed analysis. Although the Court has respect and sympathy for the sincerity and depth of plaintiffs' feelings regarding parity, we are unable to find a legal basis for ruling that plaintiffs are entitled to parity of salaries on the facts present under the circumstances of this case.

APPENDIX B-1

APPENDIX B-1

Order that judgment be entered dated October 18, 1973, of the United States District Court for the District of Columbia.

Filed
October 23, 1973
James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH A. BRODERICK, *Plaintiff,*	)	
v.	)	Civil Action No. 1534-71
CATHOLIC UNIVERSITY OF AMERICA, *Defendant.*	)	
DAVID J. K. GRANFIELD, *Plaintiff,*	)	
v.	)	
CATHOLIC UNIVERSITY OF AMERICA, *Defendant.*	)	Civil Action No. 1535-71

ORDER

Upon consideration of the entire record and in accordance with the findings of the Court set forth in the Memorandum filed on the 17th day of October, 1973, it is by the Court this 18th day of October, 1973,

ORDERED that judgment in the above-titled actions be entered for the defendant Catholic University of America.

/s/ Oliver Gasch
Judge

APPENDIX C

APPENDIX C

Letter from Counsel for Petitioner to the U.S. Commissioner of Education dated March 9, 1976.

Dr. Terrel H. Bell
U.S. Commissioner of Education
Office of Education
Room 4181
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Attention: Hon. John D. Phillips
Deputy Commissioner of Post-Secondary Education

Re: *Broderick* v. *The Catholic University of America*
No. 74-1152, decided January 29, 1976
(U.S. Court of Appeals, D.C.)

Dear Dr. Bell:

We are counsel to plaintiff in the above-entitled action in which the Court of Appeals for the District of Columbia Circuit handed down a decision on January 29, 1976. We intend to petition for certiorari to the United States Supreme Court on behalf of our client. We enclose a copy of the Slip Opinion of the Court of Appeals, dated January 29, 1976.

As you will see from the enclosed opinion, plaintiff-petitioner Broderick is a tenured professor of law at the law school of The Catholic University of America. He is also a priest in the Roman Catholic Church, and a member of the Order of Preachers. Petitioner alleged in his complaint that specific contractual arrangements with defendant entitled him to payment of salary on the same basis as other similarly qualified professors at the law school of the University. Defendant-respondent denied this con-

tention and insisted that it was entitled to pay petitioner according to a "lower salary scale or 'clerical discount' " that the university maintained for clerical and religious members of its faculty. The district court decided for respondent on this strict contract claim, and the Court of Appeals affirmed.

Petitioner also contended — and this will be the central contention in the petition for certiorari — that the plaintiff's tenure contract with defendant University, construed in the light of First Amendment limitations imposed upon the University with respect to use of Federal educational funds, estopped the University from enforcing contractual arrangements against petitioner based upon purely sectarian aims (such as the Court of Appeals found present in this case — see slip opinion, pp. 15, et seq.). Petitioner's contention here was that, having received higher education funds pursuant to Federal law, defendant-respondent was required by law, as well as by constitutional rule, to apply those funds for *educational,* and not specifically *sectarian,* purposes. In brief, petitioner's theory is that the funds received pursuant to Federal law are subjected to a trust concept that requires that they be used only for the *educational* purposes for which they were received. Put another way, petitioner maintains that having received these Federal funds for *educational* purposes, the University is estopped to urge its entitlement to ignore First Amendment establishment and free exercise limitations, and to use such Federal funds to serve *sectarian* purposes. Petitioner argues that the statutes under which the Federal funds were appropriated should be so construed.

While seeming to agree with petitioner that the use of Federal funds for sectarian purposes was improper, the Court of Appeals affirmed the decision of the district

court on this point as well. The opinion of the Court of Appeals suggested that petitioner could not contest a specific use of Federal higher education funds; that it was necessary to attack the constitutionality of the entire appropriation to the particular institution, or not at all. The opinion also raised doubts whether petitioner was an appropriate party to make such an attack, even if he were of a mind to do so. The Court suggested that attack on Establishment grounds required joinder in the action of the Office of Education and/or the Secretary of Health, Education and Welfare.

The petition for certiorari will contend that the Court of Appeals erred in limiting challenge to an unconstitutional use of higher education funds to an "all or nothing" attack upon the qualification of the particular institution to receive Federal funds; that there is no previous judicial authority for this proposition; and that policy considerations recommend that a litigant such as petitioner be permitted to attack, on this trust-estoppel theory, a glaring discriminatory use of Federal *educational* funds for concededly *sectarian* purposes. Petitioner contends that if the Court will not permit specific attack such as petitioner makes in this case, then the limitations imposed upon the government by the "no entanglement" doctrine of *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), and *Tilton* v. *Richardson,* 403 U.S. 672 (1971), would unjustifiably be extended to the extent that there would be an absolute bar to any effective oversight of the constitutional use of *higher education* funds by *sectarian* institutions. Recognition of the constitutional desirability of permitting the invocation of First Amendment religion clauses by private action, to enjoin the use of Federal education funds in the service of sectarian ends, clearly underlies *Flast* v. *Cohen,* 392 U.S. 83 (1968).

The Court of Appeals focuses upon the sectarian uses made of the funds, and treats the case, not as one involving an *educational* institution improperly using Federal funds for sectarian purposes, but as one involving a sectarian *religious* institution. If it is to be so treated then the conclusion, of course, follows that the courts will not intervene in internal ecclesiastical affairs.

Petitioner stoutly contests the treatment and the conclusion.

The Court of Appeals correctly states that petitioner has no design by his action to assert that defendant has lost its basic qualifications to receive Federal higher education funds. Petitioner does assert that respondent may not both receive such funds, on the assumption that respondent fits within the *Tilton* higher educational institution model, *and* at the same time frankly use the Federal funds so received to further sectarian ecclesial ends. Petitioner asserts that this is an *education* case, and should be treated as such. Petitioner also asserts that defendant will continue to be eligible to receive Federal funds if it ceases to use, or is estopped from using, those Federal funds for sectarian purposes.

Petitioner's petition for a writ of certiorari, in course of preparation, will stress the above points, in addition to one other: that a judicial decision permitting respondent University to use such Federal funds for sectarian purposes, in face of petitioner's free exercise of religion rights, constitutes governmental action within *Shelley* v. *Kraemer,* 334 U.S. 1 (1948).

Petitioner takes cognizance of the Court of Appeals' stress upon the proper interest of the Office of Education in this matter. Petitioner does not agree with the Court of Appeals' suggestion that the Establishment argument

is available only in an all-out action seeking to disqualify respondent from any receipt of Federal higher education funds. However, petitioner adverts to the likelihood that the Supreme Court, in connection with the petition for certiorari, and any decision thereafter, may consider the views of your office significant, and perhaps required on primary jurisdiction grounds.

This letter addresses five specific questions to you:

1. Does your Office have a position with respect to whether a university, such as respondent, which receives federal higher education funds, may use them in part to maintain a religious-based separate scale of payment to clerical members of its faculty, under the circumstances recited in the opinion of the Court of Appeals?

2. Does your Office have a position with respect to whether raising this issue in a private action, with or without participation by the Office of Education, is an appropriate mode of enforcing the constitutional and statutory limitations upon use of federal education funds? Or do you concur, administratively, with the suggestion of the Court of Appeals that an attack upon receipt or use of higher education funds, on statutory or constitutional grounds, must be "all-out", i.e., a particular use may not be singled out apart from an attack upon the educational institution's total capacity to receive such funds?

3. Would your Office have interest in filing an amicus brief on these matters, in the event that certiorari is granted?

4. Would your Office have interest in filing appropriate papers in support of petitioner's petition for certiorari?

5. In any event, would you kindly respond to the issues raised above by letter to counsel for petitioner that might be made an annex to the petition, or to the petitioner's brief if the petition for certiorari is granted?

The petition for certiorari must be filed by April 29, 1976. However, counsel for petitioner plan to make an early filing with the hope that their client may be aware of the disposition of the petition by the end of this Term of Court, which coincides closely with the academic year. It may be too much to hope that argument and disposition of the case may take place this Term, in the event that the petition is granted. However, we would like to take every step in our power to make that possible. I am sure you realize the undesirability of a primary jurisdiction question being raised at the Supreme Court level. It did not previously seem likely. However, the intimations of the Court of Appeals (see slip opinion, p. 18, fn. 23) now center our attention on this concern, which prompts this letter to you. I hope that the interests of your Office will make possible favorable action in response to these questions.

On February 28, 1976, we mailed a draft copy of this letter to counsel for respondent, so that their views may reach you contemporaneously with our own.

Very truly yours,

FORSYTH DECKER MURRAY & BRODERICK

By /s/ Vincent L. Broderick

APPENDIX D

APPENDIX D

Letter from Department of Health, Education, and Welfare to Counsel for Petitioner dated March 18, 1976.

Forsyth Decker Murray & Broderick
51 West 51st Street
Rockefeller Center
New York, New York 10019

Dear Mr. Broderick:

Your letter of March 9, 1976 to Commissioner Bell concerning the case of *Broderick* v. *The Catholic University of America,* Civ. No. 74-1152 (U.S. Court of Appeals, D.C.) has been forwarded to this office for consideration.

Prior to communicating with you further regarding this matter, since the questions you raise involve a matter in litigation, it will be necessary for our office to consult with the Department of Justice. We will be in touch with you following this consultation.

Sincerely,

/s/ Theodore Sky

Theodore Sky
Acting Assistant General Counsel
for Education

APPENDIX E

APPENDIX E

Letter from Department of Health, Education, and Welfare to Counsel for Petitioner dated April 1, 1976.

Mr. Vincent L. Broderick
51 West 51st St.
Rockefeller Center
New York, N.Y. 10007

Dear Mr. Broderick:

This is in further reference to your letter of March 9. With respect to questions 1 and 2 raised in your letter, the Office of Education does not have a position at this time. However, apart from the alleged constitutional issue, assuming that the payment of faculty salaries is an appropriate expenditure of the Federal funds awarded to Catholic University, section 432 of the General Education Provisions Act, 20 U.S.C. §1232a as pertinent here, prohibits Federal interference in the ". . . direction, supervision, . . . administration, or personnel of any educational institution. . .". Thus, it may be that the Office of Education would be precluded from interfering in a matter such as described in your letter because it primarily involves an issue concerning the internal administration of the educational institution.

As you know, the issue of Federal government participation in the litigation raised in questions 3 and 4 of your letter is ultimately within the authority of the Office of the Solicitor General, Department of Justice.

We do not believe that we have sufficient information available at this time to make any recommendation to the Office of the Solicitor General with respect to such participation.

Sincerely,

/s/ Frank L. Dell'Acqua

Frank L. Dell'Acqua
Acting Assistant General Counsel
for Education

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1577

JOSEPH A. BRODERICK,
Petitioner,
v.
CATHOLIC UNIVERSITY OF AMERICA,
Respondent.

No. 75-1647

DAVID J.K. GRANFIELD,
Petitioner,
v.
CATHOLIC UNIVERSITY OF AMERICA,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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July 2, 1976

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the practice of Catholic University, a private, religiously related institution, in paying clerical members of its faculty on a lower salary scale than that applicable to its lay faculty is, simply by virtue of the University's receipt of federal funds, governmental action violating the Establishment Clause or Free Exercise Clause of the First Amendment.

STATEMENT OF THE CASE

The respondent, the Catholic University of America, is a private, church-related institution of higher education, located in Washington, D.C. Its Board of Trustees consists of 30 persons, 15 of whom are clerics (including five Cardinals) (A 16 n. 19).[1] The Archbishop of Washington is *ex officio* the Chancellor of the University (*id.*). Three of its schools are under the direction of the Holy See (*id.*). No representative of the federal government is in any way involved in the direction, supervision, or control of any affairs of the University (T. 480, 497).

The University derives approximately 43 percent of its annual revenues from student and tuition fees, and 20 percent from gifts and grants, primarily acquired through diocesan collections conducted by bishops throughout the country (A 16 n. 19; Ex. 1d, T. 501-02). Approximately 25 percent of its revenues come from the federal government (A 17 n. 21, B 14 n. 33). These funds are essentially of two types: funds for research programs resulting in no profit to the University and wholly free from governmental participation; and funds for tuition aid to students (Ex. 1d; T. 495-96). The statutes under which the University receives these funds specifically prohibit the Government from exercising "any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel" of the University. 20 U.S.C. § 1232a. The remainder of the University's revenues come from miscellaneous nongovernmental sources (Ex. 1d). The University does not keep separate accounts for its various schools, and the federal funds it receives go into its general account (A 18).

The University has historically maintained a practice of paying the clerical members of its faculty on a lower salary scale than that followed for its lay faculty members. This practice was deliberately chosen by the bishops as a form of financial support for the University, and was in accord with a tradition whereby Catholic colleges have generally expected some sacrifice from their faculty members, particularly the clerical members (A 3). The practice was also intended to prevent competition, for financial reasons, among the diocesan clergy for appointments to Catholic University, and to deter those who had been appointed from declining to return to work in their home dioceses if needed (A 3 n. 3). Beginning in 1945, efforts were made to put the salaries of the University's clerical faculty members on a parity with salaries of lay members (A 4); and in 1968 the Board of Trustees affirmed the principle of parity as a "goal" to be achieved "eventually" (A 5). In 1970, because of the straitened financial condition of the University, the Board determined that it could not achieve the goal of parity at that time; and hence the University continued to pay its

[1] Throughout this brief, citations to "A—" refer to the opinion of the Court of Appeals, reprinted as Appendix A to each of the petitions for certiorari (and numbered identically in both). Citations to "B—" refer to the District Court's opinion, reprinted as Appendix B to each petition for certiorari. Citations to "Brod. Pet. ——" and "Gran. Pet. ——" refer to petitioner Broderick's petition and petitioner Granfield's petition, respectively. Finally, citations to "T. ——" refer to the transcript of the trial, and citations to "Ex. ——" refer to exhibits in the record.

clerical faculty on the lower, "clerical scale" (A 7, T. 528-39).[2]

Both the petitioners were, at the times relevant to this case, tenured professors at the University's law school. Both are also Catholic priests and members of religious orders, and as such were subject to the University's clerical salary scale.[3] In July 1971, the petitioners brought separate actions against the University in the United States District Court for the District of Columbia, seeking to have the clerical scale set aside as applied to them. They alleged first that they were entitled, as a matter of promissory estoppel, contract, and property right, to a salary on the same basis as that applied to lay faculty members. They also alleged that the University's policy of paying clerics on a lower scale violated the Establishment Clause and the Free Exercise Clause of the First Amendment and other provisions of the Constitution.

After a consolidated trial, the District Court entered judgment for the University. It rejected the petitioners' nonconstitutional allegations on essentially factual grounds (B 6-13); and it rejected their constitutional claims on the ground that the University's policy in question did not constitute "governmental action" and

[2] Since that time, however, Catholic University has pursued its "goal" of parity; and indeed, at the present time, it has brought the salaries of all its clerical faculty up to the minimum for University professors. Although this does not yet mean that each priest-professor receives the same salary as he would if he were a lay person, it shows that the University is approaching the goal of complete parity.

[3] Petitioner Broderick has now resigned from the faculty of Catholic University, effective in August 1976. Petitioner Granfield, who remains at the University, has had his salary brought up to the minimum for University professors (see note 2, *supra*); and the Provost of the University has instructed the law school to raise his salary further, in periodic increments, until it is on full parity with the salaries of lay faculty at the law school.

was thus not subject to constitutional restraints (B 13-15).

On appeal, petitioner Granfield's primary constitutional contention was that, because of the federal funds provided to the University, its clerical salary scale was attributable to the Government, and that that scale, by imposing a burden on the petitioner because of his clerical status, violated his rights under the Free Exercise Clause. In this connection, Granfield argued that the test for attribution required less governmental participation than usual, because the Government's continued financial aid to the University, while the latter maintained the clerical scale, violated the Establishment Clause.[4] Petitioner Broderick argued, *inter alia*, that because the federal funds received by the University went into its general account out of which faculty salaries were paid, the University's clerical scale was "governmental action"; that that action violated his free-exercise rights by discriminating against him on account of his religious status; and that the clerical scale, by involving the use of federal funds in order to promote a religious interest, constituted an establishment of religion. In connection with his Establishment Clause argument, Broderick relied exclusively on cases challenging the *Government's* provision of aid to religiously related schools, rather than challenging a particular policy of such a school itself.[5]

The Court of Appeals affirmed the District Court's decision. It rejected the petitioners' Establishment Clause claims, stating that the petitioners had failed to seek injunctive relief against continued governmental aid to the University, but had attacked only one specific practice at the University (A 17-18). The court thus held that

[4] See Father Granfield's principal brief in the court below, pp. 32-35, 38-41, and his reply brief, pp. 17-19.

[5] See Father Broderick's principal brief in the court below, pp. 43-51, and his reply brief, pp. 10-12, 14-15.

there was no genuine dispute as to whether continued governmental aid to the University violated the Establishment Clause, and that that issue was therefore nonjusticiable by the court (A 19-20). It is understandable that the Court of Appeals rested its decision regarding the establishment claims primarily on this ground, when one considers the confusion in the petitioners' briefs in that court, particularly Father Granfield's, as to whether their Establishment Clause challenges were to the Government's aid to the University or to the University's own policy. The court did state, however, that to the extent that the petitioners challenged the University's clerical scale as governmental action establishing religion, that challenge was without substance because the clerical scale was an internal religious matter in which the Government was not involved (A 21 n. 27).

The court also rejected the petitioners' free-exercise claims. It stated first that while it had previously found no governmental action in the conduct of Catholic University,[6] it did not have to reach the question whether governmental action should be found more readily in this case, where a free-exercise violation was asserted, as it is in cases involving alleged racial discrimination (A 22-23). The court held that a private institution charged with infringement of religious freedom is subject to First Amendment restraints only where the Government is significantly involved in the alleged infringement (A 23). In the present case, the court said, the clerical scale was simply an internal religious matter whereby one arm of a particular church was charged with discrimination against certain members of that church's own religious orders (A 23-25). Hence, the court concluded that there was no private infringement of religious freedom to impute to the Government and therefore no violation of the Free Exercise Clause (A 25).

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[6] *Spark* v. *Catholic University*, 510 F.2d 1277 (D.C. Cir. 1975).

ARGUMENT

The primary contention of both petitioners here is that the court below erred in holding their Establishment Clause claims nonjusticiable on the ground of a lack of genuine dispute as to the validity under that Clause of the Government's financial aid to the University. According to the petitioners, a private suit against a church-related university receiving federal funds, brought by a faculty member (even a co-religionist one) and challenging the university's expenditure of such funds in a way that promotes a religious interest, is a proper and desirable way to ensure enforcement of the Establishment Clause prohibition against governmental action promoting religion. The petitioners also argue that the Court of Appeals erred in rejecting their establishment and free-exercise contentions on the ground that the University's clerical scale was an internal religious matter. In their view, that holding would allow a church-related university receiving federal funds to defeat the First Amendment claims of its co-religionist faculty members simply by asserting that there is a religious reason for the challenged policy.

As the petitioners now appear to admit, the court below correctly decided that, to the extent they attacked the Government's provision of funds to a church-related university, their action was required to be brought against the Government itself. The petitioners did not sue the Government in the present case, and they now concede that they are not in any way challenging the federal aid to Catholic University (Brod. Pet. 10, Gran. Pet. 13-14). Hence, the petitioners' arguments, however phrased, must be that the *University* violated the Establishment and Free Exercise Clauses by its use of the clerical scale. Obviously, since only the Government is bound by the First Amendment, the petitioners could not prevail unless the University's adoption and implementa-

tion of the clerical scale are attributable to the Government. However intricate and convoluted the petitioners' arguments to this Court may be, those arguments would be, and are, completely answered by the fact that Catholic University's challenged practice is not "governmental action." The decision below is fully sustainable on that ground.

Accordingly, we will demonstrate first that, under established principles, and as explicitly found by the District Court, Catholic University's clerical scale is plainly not governmental action. That finding raises no novel or important constitutional issue; it simply requires application to the facts of this case of criteria and standards established by this Court and amplified by the lower courts. Indeed, the petitioners spend very little time in their petitions discussing the application of the governmental-action doctrine in the present circumstances, and they allege no conflict in the circuits on that point (Brod. Pet. 16-17, Gran. Pet. 24-25). Consequently, the decision below, which is wholly sustainable on the ground of a lack of governmental action, does not warrant review by this Court.[7]

In addition, however, we will go on to demonstrate briefly that even if Catholic University's clerical scale were deemed to be governmental action, the petitioners' claims that it violates the Establishment and the Free Exercise Clauses are insubstantial and not deserving of this Court's review.

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[7] It should also be noted that the petitioners' basic grievance in the courts below was that they were denied the parity which the University had agreed to grant them—a claim which they brought primarily as a matter of common-law contract right and promissory estoppel and which they attempted to raise, in addition, as a constitutional question. This Court should not sanction the petitioners' efforts to convert what is essentially a state-law claim into a constitutional claim to be decided in federal court. Cf. *Paul* v. *Davis*, 44 U.S.L.W. 4337 (1976).

I. Under Established Principles, Catholic University's Policy Regarding the Salaries of Its Clerical Faculty Is Not Attributable to the Government, and There Is Thus No Need for This Court's Review.

This Court has made clear that the Constitution does not apply to a private institution simply because the institution "receives any sort of benefit or service at all from the [Government] . . . ." *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972). Rather, only by "sifting facts and weighing circumstances" can it be determined whether the action of a private institution is attributable to the Government for constitutional purposes. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). Nevertheless, this Court has enunciated broad principles to govern the determination whether such governmental action exists, and has identified factors relevant to that inquiry. The lower courts have applied and interpreted those principles and factors in a variety of factual situations.

Under this Court's decisions, governmental action will be found where the Government "has so far insinuated itself into a position of interdependence with [the otherwise private entity] that it must be recognized as a joint participant in the challenged activity . . . ." *Burton*, *supra*, at 725. See also *Moose Lodge*, *supra*, at 172-75; *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 573 (1974); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *Evans* v. *Newton*, 382 U.S. 296, 299 (1966); and *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94, 119 (1973) (opinion of Burger, C.J., joined by Stewart and Rehnquist, J.J.). Thus, in order for the action of a private institution to be deemed governmental action, the Government must be significantly and comprehensively involved in, and interdependent with, the institution, and moreover must be so significantly involved in the institution's specific "challenged activity" as to be a "joint participant" in *that particular*

conduct. This Court emphasized the latter requirement in *Jackson*, where it stated that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." 419 U.S. at 351. A plethora of lower court decisions attests that there must be such a nexus in order for governmental action to be found.[8]

This Court has also indicated that a finding of governmental action may depend on whether the private entity is exercising "powers traditionally exclusively reserved to the [Government]." *Jackson, supra*, 419 U.S. at 352. See also *Evans, supra*, at 301-02; *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

Another factor relevant to the governmental-action determination has been suggested by this Court's decisions and explicitly recognized by numerous lower courts—namely, an evaluation of the offensiveness of the challenged activity as against the value of preserving the private institution free from judicial interference in that activity. The concepts of governmental action developed primarily in the context of racial discrimination, where the test was necessarily made broad because of the particular historical offensiveness of such conduct even in the private sector. See *Norwood* v. *Harrison*, 413 U.S. 455, 469-70 (1973), stating that the Constitution "places

[8] See, *e.g.*, *Golden* v. *Biscayne Bay Yacht Club*, —— F.2d —— (5th Cir. No. 74-1349, April 15, 1976), slip op. at 2921-22; *Greco* v. *Orange Memorial Hospital Corp.*, 513 F.2d 873, 878 (5th Cir.), *cert. den.*, 44 U.S.L.W. 3328 (1975); *Greenya* v. *George Washington University*, 512 F.2d 556, 561 (D.C. Cir.), *cert. den.*, 44 U.S.L.W. 3330 (1975); *Junior Chamber of Commerce of Rochester, Inc.* v. *United States Jaycees*, 495 F.2d 883, 887-88 (10th Cir. 1973), *cert. den.*, 419 U.S. 1026 (1974); *Doe* v. *Bellin Memorial Hospital*, 479 F.2d 756, 761-62 (7th Cir. 1973); *Ward* v. *St. Anthony Hospital*, 476 F.2d 671, 675 (10th Cir. 1973); *Powe* v. *Miles*, 407 F.2d 73, 81 (2d Cir. 1968).

no value on discrimination as it does on values inherent in the Free Exercise Clause." In other areas, however, a greater degree of governmental involvement has been thought necessary in order to meet the governmental-action standard.[9] This is particularly true where there is great value in keeping the private institution free from the constitutional restraints applicable to the Government, and most especially where the private entity itself is asserting its own constitutional right to freedom from governmental interference. See *Columbia Broadcasting System* v. *Democratic National Committee*, *supra*, at 120 (Burger, C.J., joined by Stewart and Rehnquist, J.J.).[10]

The present case raises no new or important question as to the proper standard for determining the presence of governmental action. The determination can be made here by "sifting" and "weighing" the particular facts of this case in light of the above principles. Application of those principles shows clearly that Catholic University's use of the clerical salary scale is not governmental action.

In attempting to raise the governmental-action question, the petitioners rely on the facts that the University receives federal financial aid (approximately 25 percent of its annual revenues), that it places those monies in its general unrestricted funds, and that it pays the salaries of its faculty from such general funds (Brod. Pet.

[9] Cases explicitly recognizing that governmental action is more readily found in racial-discrimination cases than in other cases include *Greco* v. *Orange Memorial Hospital Corp.*, *supra*, at 878 n.9 and 879; *Greenya* v. *George Washington University*, *supra*, at 560; *Jackson* v. *Statler Foundation*, 496 F.2d 623, 628-29 (2d Cir. 1974), *cert. den.*, 420 U.S. 927 (1975); and *James* v. *Pinnix*, 495 F.2d 206, 208 (5th Cir. 1974).

[10] See also *Wahba* v. *New York University*, 492 F.2d 96, 102 (2d Cir.), *cert. den.*, 419 U.S. 874 (1974); *Bright* v. *Isenbarger*, 314 F.Supp. 1382, 1390-92 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971).

17; Gran. Pet. 24). These facts, however, are hardly enough to show that Catholic University's practice of paying its clerical faculty less than its lay faculty is attributable to the Government. Where, as here, the Government exercises no influence whatever in the supervision, direction, or control of a private university's academic program, administration, personnel, or any other policy, the Government cannot be said, simply by virtue of its partial funding, to have insinuated itself into or intertwined itself with the university so as to make a specific policy of the university governmental action. The District Court so held (B 13-15), and other decisions to that effect abound.[11] Indeed, this is particularly true here since "the statutes under which the University received the funds specifically prohibit the Federal Government and its agents from exercising any supervision or control over or participating in the activities of the University." *Spark* v. *Catholic University of America*, 510 F.2d 1277, 1282 (D.C. Cir. 1975). See 20 U.S.C. § 1232a.[12]

In any event, there is no nexus between the federal funds granted to Catholic University and the University's

[11] See, *e.g.*, *Spark* v. *Catholic University of America*, 510 F.2d 1277, 1282-83 (D.C. Cir. 1975); *Williams* v. *Howard University*, 528 F.2d 658, 660 (D.C. Cir. 1976); *Greenya* v. *George Washington University*, *supra*, at 560-61; *Wahba* v. *New York University*, *supra*, at 100-02; *Grossner* v. *Trustees of Columbia University*, 287 F. Supp. 535, 547-48 (S.D. N.Y. 1968). See also *Doe* v. *Bellin Memorial Hospital*, *supra*, at 761; *Ward* v. *St. Anthony Hospital*, *supra*, at 675.

[12] It is also clear, although the petitioners do not raise this contention in their petitions, that Catholic University's congressional charter and its tax exemption are insufficient governmental involvement to make its conduct governmental action. See, *e.g.*, *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. (17 U.S.) 518 (1819); *Spark* v. *Catholic University of America*, *supra*, at 1282; *Greenya* v. *George Washington University*, *supra*, at 559-60; *Blackburn* v. *Fisk University*, 443 F.2d 121, 123 (6th Cir. 1971); *Browns* v. *Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Bright* v. *Isenbarger*, *supra*, at 1396-97.

challenged activity (the clerical scale), as required by this Court's decisions. The fact that the federal monies received by the University go into its general fund, from which faculty salaries are paid, is a bank account fortuity and no more. The federal funds are—and must be—granted to the University without any restrictions or directions, much less one involving differential treatment of clerical and lay faculty. The clerical salary practice is a purely private policy adopted by the University completely without governmental participation. It existed before the University received any federal funds and would continue to exist, except as voluntarily modified by the University, whether or not the University received federal money. Thus the Government is wholly uninvolved in the alleged discrimination against the petitioners and cannot be said to have "place[d] its power, property, and prestige behind the [alleged] discrimination." *Burton* v. *Wilmington Parking Authority*, *supra*, at 725. The court below recognized this when it stated that the First Amendment becomes relevant to a private institution "only when a governmental entity is shown to have become significantly involved in the discrimination practiced by it" (A 23), and then found no such governmental involvement in the "internal religious" policy of Catholic University (A 23-25). Because of the lack of a sufficient nexus between the financial aid and the clerical salary scale, the latter is plainly not governmental action.[13]

[13] This conclusion is in accord with other decisions of the lower courts. Thus, for example, in *Spark* v. *Catholic University of America*, *supra*, although federal funds went into the University's general account used to pay faculty salaries, the denial to a university professor of salary increases and his subsequent forced retirement, as alleged punishment for his exercise of free speech, was held not to be governmental action because of the lack of connection between the federal funds and the University's decisions. 510 F.2d at 1282. Similarly, in *Doe* v. *Bellin Memorial Hospital*, *supra*, although the hospital used federal monies to fund other

Moreover, of course, Catholic University plainly does not perform a function traditionally exclusively reserved to the Government, and the petitioners make no contention that it does. Indeed, the cases are consistent in holding that education at a private school is not such a public function.[14]

Finally, we submit that, in determining whether governmental action is present here, it is relevant that this case does not involve any allegation of racial discrimination—an area where the standard has generally been found to be easier to meet. The petitioners suggested in the court below that their allegations of religious discrimination should trigger the same standard as applies in the race context (A 22-23). Like the court below, however, this Court need not reach the question whether that analogy is valid for the typical religious-discrimination case, as held in *Golden* v. *Biscayne Bay Yacht Club*, 521 F.2d 344, 351 (5th Cir. 1975), *rev'd en banc on other grounds*, —— F.2d —— (5th Cir., No. 74-1349, April 15, 1976). The petitioners' claim here is that Catholic University—an arm of the Catholic religion—has discriminated against clerical members of *that same religion*. This hardly could give rise to what the panel opinion in *Golden* called "the same stigma of inferiority and badge of opprobrium that is characteristic of racial discrimination." 521 F.2d at 351.

Furthermore, the clerical salary policy challenged here was adopted for religious reasons (see p. 3, *supra*), and there is great value in preserving the right of a private, religious educational institution to establish religiously

operations, its refusal to perform abortions was held not to be governmental action because of a lack of any governmental involvement in the hospital's abortion policy. 479 F.2d at 761.

[14] See, *e.g.*, *Greenya* v. *George Washington University*, *supra*, at 561 n.10; *Powe* v. *Miles*, *supra*, at 80; *Browns* v. *Mitchell*, *supra*, at 596; *Bright* v. *Isenbarger*, *supra*, at 1397-98; *Grossner* v. *Trustees of Columbia University*, *supra*, at 549.

related policies free from judicial interference based on a bare pretext of governmental action. Indeed, the University itself, to the extent it is a religious institution, has a constitutional right to the free exercise of religion. *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952). See also *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 44 U.S.L.W. 4927, 4935 (1976). In such a case, before governmental action can be found, there must be a very strong showing of governmental involvement in the university's religiously related policy, for a finding that such a policy is governmental action entails the result that, to that extent, the university's religious liberty could be impaired. As we have shown, there has been no showing, much less a strong showing, of governmental involvement in Catholic University's clerical salary scale.[15]

II. Even Assuming That the University's Clerical Salary Scale Were Governmental Action, Petitioners' Claims That It Violates the Establishment and Free Exercise Clauses Are Insubstantial.

Although the lack of governmental action in this case is sufficient to sustain the decision below, the petitioners' claims of violation of the Establishment and Free Exercise Clauses are insubstantial in their own right.

1. *The Establishment Claim.* Even assuming the presence of governmental action here, the petitioners' claim that Catholic University's policy of paying *lower* salaries

[15] Petitioner Broderick's additional argument that, under *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), the decision below itself constituted governmental action violating the Establishment Clause (Brod. Pet. 17-18) approaches the frivolous. Unlike the situation in *Shelley*, Catholic University has not attempted to have any court enforce its clerical scale; the *petitioners* brought this suit. The upshot of Broderick's contention would be that whenever a court finds no governmental action in the challenged conduct of a private institution, the court's decision itself would supply the requisite governmental action.

to clerics of a particular religion actually constitutes an establishment of that very religion is bizarre at best. The far-fetched nature of this challenge under the Establishment Clause is demonstrated by the fact that it is made by priests of the same religion allegedly being established.[16] Because of the uniqueness of this claim, it has understandably given rise to no conflict in the circuits and presents no issue of general importance for this Court's decision.

In any event, this Court has in some circumstances allowed governmental aid to religion under the Establishment Clause, where the aid was indirect, its purpose was not to promote religion, and a contrary holding could cause a violation of the Free Exercise Clause. See, *e.g.*, *Walz* v. *Tax Commission*, 397 U.S. 664 (1970) (property tax exemption); *Wisconsin* v. *Yoder*, 406 U.S. 205, 220-21 (1972) (exemption from compulsory school attendance requirement); *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963) (exemption from requirement to work on Saturday in order to get unemployment benefits); *Everson* v. *Board of Education*, 330 U.S. 1, 16-18 (1947) (transportation of students). See also *Roemer* v. *Board of Public Works of Maryland*, 44 U.S.L.W. 4939, 4942-43 (1976).[17] In the present situation, even if the University's payment of lower salaries to clerical faculty from a general account that includes federal funds were deemed to be governmental action, the Government's aid

[16] We note that the petitioners have no standing *as taxpayers* to challenge the expenditure of federal funds under the Establishment Clause, since the petitioners, having taken vows of poverty, cannot accumulate property and therefore pay no federal income taxes (T. 133-34, 412).

[17] In *Roemer*, the Court approved Maryland's form of financial aid to private, religiously related colleges even though "[b]udgetary considerations lead the colleges generally to favor members of religious orders, who often receive less than full salary." 44 U.S.L.W. at 4946.

to religion would be indirect at best, for, as demonstrated above, the federal funds relied on to show governmental action have no relationship whatever with the University's decision, adopted without governmental participation, to employ a separate clerical salary scale, and thus are "not aimed at establishing, sponsoring, or supporting religion." *Walz*, *supra*, at 674. On the other hand, again even assuming that the clerical scale were considered as governmental action, the fact remains that Catholic University is not a public institution, but a private, religiously related university with its *own* right to religious freedom; and acceptance of the petitioners' argument would lead to an interference with the University's exercise of that right. In these circumstances, the petitioners' attack on the clerical scale raises no substantial claim under the Establishment Clause.[18]

2. *The Free Exercise Claim.* The University's policy of non-parity for its clerical faculty plainly does not in any way abridge the petitioners' rights to practice the Catholic faith or to function as priests of that faith, nor does it discriminate against them on account of their religion. The petitioners' claim is that that policy discriminates against them on account of their *status* as priests of the Catholic religion. Even if that policy were deemed in some sense to be governmental action, however, it must be remembered that it is a policy adopted by an institution affiliated with the same church with which the petitioners are affiliated. As the court below held, the alleged discrimination by an arm of a particu-

[18] Indeed, the petitioners' thesis presents a constitutional paradox which only a law professor could relish. It would mean that a religiously related university, by receiving federal funds which are themselves *not* prohibited by the Establishment Clause—and the petitioners concededly do not contend that they are so prohibited—would violate the same Establishment Clause by its very continued existence as a religiously related university exercising its freedom to follow religious policies.

lar church against certain of that church's own members is an internal religious matter that "does not involve the sort of restraint which is suspect under the Free Exercise Clause" (A 25).[19] Cf. *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, *supra*.

When the petitioners voluntarily became priests, they were well aware that they might be subjected by their church, on account of their status, to certain treatment and restraints to which others would not be subjected. Accordingly, in a situation where governmental action allegedly discriminating against them because of that status is in fact the action of church authorities which is deemed to be governmental action, the petitioners' voluntary acceptance of clerical status constitutes a waiver of their free-exercise rights as against that action. Just as a person may waive constitutional rights as against the action of the Government itself in order to obtain benefits from the Government, so the petitioners waived their free-exercise rights as against the action of church authorities, even when treated as governmental action, in order to obtain benefits from the church.

Moreover, the petitioners, as priests of religious orders, came to Catholic University with the approval of the superiors of their orders, who control their assignments as priests and who were fully aware of the clerical salary policy. Hence, any alleged infringement of their free-exercise rights comes essentially from their choice to become religious-order priests and their vows of obedi-

[19] The internal nature of the petitioners' claim is demonstrated further by the fact that, since petitioners are members of religious orders and have taken vows of poverty, they can acquire no property, and any salary they earn from Catholic University, in excess of what they require for personal needs, goes to their respective religious orders (T. 134, 412). Viewed in this light, the University's clerical salary policy is simply an intra-church arrangement among the bishops, the orders, and the University. Its presence or absence has no economic consequences for the petitioners personally, nor does it impose any stigma upon them.

ence—self-imposed restrictions on their right to practice their religion as they might otherwise see fit.

In sum, even if the University's clerical scale were considered to be governmental action, it nevertheless arose wholly within the context of a particular religion and would not constitute the type of infringement of religious liberty prohibited by the Free Exercise Clause. In the particular circumstances of this case, then, there is no need for this Court's review.

CONCLUSION

For these reasons, we respectfully urge this Court to deny the petitions for certiorari in both of the present cases.

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July 2, 1976

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1577

JOSEPH A. BRODERICK,

Petitioner,

v.

CATHOLIC UNIVERSITY OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER JOSEPH A. BRODERICK

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REPLY BRIEF OF PETITIONER JOSEPH A. BRODERICK

Respondent's brief — a) by conceding that federal funds at respondent University flowed directly into faculty salaries; b) by aggressively justifying the application of those funds to serve religious purposes; and c) by insisting that such religious application of those funds is immune to judicial challenge — makes a most convincing case that certiorari should be granted.

Thus respondent's brief candidly concedes that federal funds were used to pay faculty salaries:

> "In attempting to raise the governmental-action question, the petitioners rely on the facts that the University receives federal financial aid (approximately 25 percent of its annual revenues), that it places those monies in its general unrestricted funds, and that it pays the salaries of its faculty from such general funds . . ." (R. 11).*

These federal funds were concededly disbursed inequitably among faculty members to serve religious rather than educational purposes — a practice strenuously and expressly justified by respondent on religious grounds:

> ". . . The practice [of clerical discount in faculty salaries] was also intended to prevent competition, for financial reasons, among the diocesan clergy for appointments to Catholic University, and to deter those who had been appointed from declining to work in their home dioceses if needed." (R.3).**

* * *

> "Furthermore, the clerical salary policy challenged here was adopted for religious reasons . . ., and there is great value in preserving the right of a private, religious educational institution to establish religiously related policies free from judicial interference based on a bare pretext of governmental action . . ." (R. 14-15).

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* Citations to "R__" refer to respondent's brief: "P__" refers to petition.

** But cf., *Tilton* v. *Richardson*, 403 U.S. 672, 683-5 (1971), where the Court declared unconstitutional one application of federal funds where there was a possibility that in the distant future religious rather than educational purposes would be served.

Here in its purest form is respondent's claim of entitlement to federal government financing of its avowedly religious policy. Respondent argues, quite disarmingly, that notwithstanding the careful strictures of *Tilton**, once funds are granted to a religiously related institution of higher education, their use becomes immune to challenge, and they can be used for unrestricted religious purposes. One would not have thought that *Roemer*** and *Tilton* had left *Schemmp**** so far behind.

Petitioner's contentions, directly contested by respondent's brief, come to this:

1. A statute authorizing federal educational grants, for specific and limited purposes, to religiously affiliated higher educational institutions might be upheld as not, without more, involving aid to "church" (*Schemmp*) or entailing "entanglement" (*Tilton*).

2. There is no constitutional limitation on the government's power, and responsibility, to ferret out specific misuse (whether larcenous or religious) of such legitimately appropriated educational funds.

3. The statutory limitation as to governmental supervision of funds granted to educational institutions (20 U.S.C. Section 1232a) cannot constitutionally be read as disarming the government from proceeding against any patent misuse (for religious purposes) of legitimately authorized educational funds. To read it so would itself constitute an Establishment, i.e., by establishing a

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* *Tilton* v. *Richardson*, 403 U.S. 672 (1971).

** *Roemer* v. *Board of Public Works of Maryland*, 44 U.S.L.W. 4939 (1976).

*** *Abington School District* v. *Schemmp*, 374 U.S. 203 (1963).

sanctuary for free religious activities financed directly by federal funds*.

4. A recipient of federal educational funds is legally required to use these funds for the specific educational purposes for which they were awarded. Further, a religiously affiliated educational institution is constitutionally required not to use them for independent religious purposes.

5. For these reasons respondent's claim of "Free Exercise" sanctuary to use educational funds as unrestricted is novel and constitutionally unacceptable.

6. Plaintiff in a contract action** for salary paid in part directly from such Government educational funds may rely upon the recipient institution's constitutional obligation, as above outlined, and obtain court enforcement of the constitutional and statutory requirement that respondent use educational funds for educational and not for religious purposes.

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* The suggestions in this area in the petition were perhaps too restrictive (see P. 9, 11, 12). Thus HEW counsel has reserved "constitutional considerations" in referring to government exclusion by statute from "interference in the '. . . direction, supervision, . . . administration, or personnel of any educational institution . . .' " (P. App. E).

** Respondent's suggestion (P. 17-19) that contractual disputes between itself and petitioner are "internal religious matters" of the church with which both are affiliated should receive short shrift. Petitioner is a law professor with tenure at respondent's law school, teaching secular legal courses. By happenstance, he is one of two priests on the law school faculty, but the premise of his employment is his legal education, practice and background and not his religious status. Negotiations with respect to his tenure contract were had between him and respondent, and enforceable legal consequences stemmed therefrom which were fully considered by the Court below. Respondent has represented itself as an educational institution; it has dealt with petitioner and all of its law professors as such; and it has qualified as such for the receipt of federal funds. It may not be permitted to use its religious affiliation as a shield to prevent judicial scrutiny.

7. In light of *Roemer**, the very fact that respondent makes the argument that the professor-educational institution relationship in a church-related institution is an internal religious affair underscores the desirability for this Court, in this case, to grant certiorari.

July 21, 1976

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* *Roemer* v. *Board of Public Works of Maryland*, 44 U.S.L.W. 4939 (1976). *Roemer*, of course, involved state and not federal funds. In *Roemer* the Court considered the process by which state aid was disbursed, and "no particular use of state funds" was before it. The Court assumed that the college recipients of state funds would "exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate", expecting that they would "give a wide berth to 'specifically religious activity,' and thus minimize constitutional questions". It noted that "[s]hould such questions arise, the courts will consider them." (44 U.S.L.W. 4946-7).

see

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